ROBINSON MCFADDEN
ATTORNEYS AND COUNSELORS AT LAW

ROBINSON, MCFADDEN & MOORE, P.C.

COLUMBIA | GREENVILLE

Bonnie D. Shealy
1901 MAIN STREET, SUITE 1200
POST OFFICE BOX 944
COLUMBIA, SOUTH CAROLINA 29202
PH
(803) 779-8900
FAX
(803) 252-0724

November 15, 2004

VIA HAND DELIVERY

Mr.George N. Dorn, Jr.
Executive Director
Public Service Commission of South Carolina
PO Drawer 11649
Columbia, SC 29211

**Re: Petition of Columbia Energy LLC's for a Declaratory Order
Docket No. 2004-267--E**

Dear Mr. Dorn:

Enclosed for filing please find Columbia Energy LLC's Memorandum in Opposition to SCE & G's Motion to Dismiss. Please stamp the extra copy provided as proof of filing and return it with our courier. By copy of this letter we are serving the same on counsel for all interested parties.

Should you have any questions, please have someone on your staff contact me.

Very truly yours,

ROBINSON, MCFADDEN & MOORE, P.C.

Bonnie D. Shealy

Bonnie D. Shealy

BDS/mfc
Enclosures

cc/enc.: Catherine D. Taylor, Esquire
Len S. Anthony, Esquire
Kendall Bowman, Esquire
Paige Gossett, Esquire
Charles H. Williams, II, Esquire
Mitchell Willoughby, Esquire

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

Docket No. 2004-267-E

In re: PETITION OF COLUMBIA ENERGY LLC FOR A DECLARATORY ORDER CONCERNING AGREEMENT WITH SCE&G FOR WAIVER OF QUALIFYING FACILITY STATUS	COLUMBIA ENERGY LLC'S MEMORANDUM IN OPPOSITION TO SCE&G'S MOTION TO DISMISS

South Carolina Electric & Gas Company ("SCE&G") filed a motion to dismiss the petition of Columbia Energy LLC ("Columbia Energy") in this docket on the grounds that the Public Service Commission of South Carolina ("Commission") lacks jurisdiction over the matter. Columbia Energy submits this memorandum in opposition to that motion and requests that the Commission deny the motion.

BACKGROUND

In 2000 Columbia Energy filed an application with the Commission for authorization to construct and operate a natural gas-fired, combined cycle power generation facility in Calhoun County, South Carolina ("Calhoun Facility"). Columbia Energy was issued a Certificate of Environmental Compatibility and Public Convenience and Necessity for the construction and operation of the Calhoun Facility in Order No. 2001-108, Docket No. 2000-487-E ("Certification Docket"). In Order 2001-108 the Commission found that the Calhoun Facility is a Qualifying Facility under the terms of

PURPA and the regulations of FERC. SCE&G intervened in the Commission docket. SCE&G and Columbia Energy executed a Settlement Agreement which is the subject matter of the declaratory judgment sought in this action. In that Settlement Agreement SCE&G obtained from Columbia Energy a waiver of certain rights which Columbia Energy had pursuant to PURPA. Some months ago Columbia Energy informed SCE&G that it was considering the question of whether the waiver was unenforceable.

On June 25, 2004 SCE&G filed a declaratory judgment action seeking injunctive relief in the Calhoun County Court of Common Pleas, (*South Carolina Electric & Gas Co. v. Columbia Energy, LLC*, Case No. 04-CP-09-095) in regard to the same Settlement Agreement which is the subject of this petition for a declaratory order. In its original complaint in that action SCE&G sought a permanent injunction which would prevent this Commission from exercising jurisdiction over the Settlement Agreement. Columbia Energy filed a motion to dismiss the Calhoun County complaint on the grounds that the Commission has primary jurisdiction over PURPA issues and the Settlement Agreement which is a contract between an electric utility and a Qualifying Facility. On September 16, 2004, the day before a hearing on Columbia Energy's motion, SCE&G filed an amended complaint which added claims for breach of contract and promissory estoppel.

The hearing on Columbia Energy's motion to dismiss the complaint was held on September 17, 2004. At the hearing, Columbia Energy acknowledged that the Commission would not have jurisdiction over the new breach of contract claim included in the amended complaint and requested that the circuit court case be stayed pending the Commission's review of this petition for a declaratory ruling. The Honorable Steven

H. John issued an Order of Remand and Granting Stay dated October 14, 2004, ("Remand Order") in which the Court found that pursuant to the doctrine of primary jurisdiction the case should be referred to the Commission and stayed while the Commission considers the issues referred to it by the Court. Remand Order, page 6. The Remand Order is attached as Exhibit 1.

ARGUMENT

1. THE COMMISSION HAS PRIMARY JURISDICTION OVER THE SUBJECT MATTER OF THE PETITION FOR A DECLARATORY RULING

As indicated in the Remand Order, the doctrine of primary jurisdiction has been recognized in South Carolina. See *Medical University of South Carolina v. Taylor,* 294 S.C. 99, 362 S.E.2d 881 (Ct. App. 1987). Citing the leading case on primary jurisdiction, Judge John indicated that the United States Supreme Court held that the doctrine of primary jurisdiction allocates law-making power over certain aspects of commercial relations by transferring from the court to the agency the power to determine some of the incidents of such relations. *U.S. v. Western Pacific Railroad Co.*, 352 U.S. 59, 65 (1956).

> The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. 'Exhaustion' applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. 'Primary jurisdiction,' on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

United States v. Western Pacific, 352 U.S. at 63-64. Remand Order, p. 3-4.

Judge John examined three factors outlined in a FERC decision to reach his conclusion that the cases should be referred to the Commission and stayed while the Commission considers whether Columbia Energy has the ability to require SCE&G to purchase power despite the existence of the settlement agreement. Remand Order, p. 4-6. Those factors are:

(1) whether the agency possesses some special expertise which makes the case peculiarly appropriate for decision by the agency;
(2) whether there is a need for uniformity of interpretation of the type of question raised in the dispute; and
(3) the possibility of an adverse impact on the regulatory responsibilities of the administrative agency.

Arkansas Louisiana Gas Co. v. Hall, 7 FERC P 61,175, 30 PUR4th 224, 79 WL 167678, *reh'd denied*, 8 FERC p 61,031 (1979) (copy attached).

Judge John indicated that it is beyond dispute that the Commission has special expertise which makes it the appropriate forum to decide PURPA related issues. Remand Order, p. 5.

The next factor is whether uniform interpretation is required. Section 210 of PURPA directed FERC to adopt regulations requiring electric utilities to interconnect with and purchase electric energy from Qualifying Facilties ("QFs") in order to encourage cogeneration and small power production. 16 U.S.C.A. § 824a-3. In addition, PURPA requires each state commission to implement such rules for each electric utility subject to its rate making jurisdiction. *Id.* Under PURPA and the implementing regulations, the Commission has responsibility for overseeing the implementation of PURPA within South Carolina. In the Remand Order, Judge John indicated that the Commission has been vested under Congress' regulatory scheme with broad responsibility to implement PURPA. He found that the second factor of uniform interpretation also requires referral to the Commission. Remand Order, p. 5.

In regard to the third factor, the Remand Order noted that the Commission has adopted a series of orders recognizing and delineating certain of the FERC requirements and has asserted its continuing jurisdiction over issues such as the ones that are raised in this action. Remand Order, p. 5-6. See also Orders 81-214, 85-347, and 89-56. In Order No. 81-214 in Docket 80-251-E the PSC held:

> In recognizing the right of contract negotiation under these rules, and, in fact, encouraging the same, the Commission does not intend to, nor does it, divest itself of its statutory authority, responsibility, and jurisdiction to supervise the affected electrical utilities. The Commission recognizes the need to be able to review the contracts of the electric utilities which it regulates. The Commission affirms the right of the affected electrical utility, and the qualifying facility to submit complaints regarding such agreements to the Commission for review. *The Commission retains its jurisdiction to review any agreements, pursuant to said complaint or on its own motion, between the affected electrical utility and the qualifying facility as to the reasonableness and as to its compliance with the rules of the Commisssion and PURPA. Should the Commission find the terms of the agreements would not encourage the development of cogeneration and small power production facilities, are not fair, reasonable or in the public interest, or are not in compliance with PURPA or the Commission's Orders, the Commission may declare the agreements null and void pursuant to its authority under South Carolina law to review contracts for purchases as part of its responsibility to regulate affected utilities.*

Order No. 81-214, p. 7 (emphasis supplied). See also Order No. 81-214, p. 18 & 20. Subsequent PURPA orders of the Commission emphasized that the Commission's actions were designed to encourage cogeneration and small power production in South Carolina. See Order Nos. 85-347, p. 39, and 89-56, p. 12-13. The Commission retained jurisdiction over PURPA contracts. Columbia Energy submits that this Commission must exercise jurisdiction over this dispute in order to protect its ability to oversee the implementation of PURPA in this state. Judge John also found that the failure to apply the doctrine of primary jurisdiction may have an adverse impact on the regulatory responsibilities of the Commission. Remand Order, p. 6.

SCE&G seeks dismissal on the basis that the proper forum for resolution of the issue as to who has jurisdiction is the circuit court. The Fourth Circuit Court of Appeals dismissed a similar case on the grounds that the proper remedy was an application to the Public Service Commission with the right of appeal to the South Carolina courts. *United Merchants & Manufacturers, Inc. v. SCE&G*, 208 F.2d 685 (1953). In the *United* case, United alleged that it withdrew its opposition in an SCE&G rate case based upon an oral agreement with SCE&G that the company would receive an 8% rate increase instead of a 15% increase for 8 years. When SCE&G increased the rate 15% within 3 months, United filed a complaint with the Commission, but failed to appeal the Commission's decision. United then filed a complaint in U.S. District Court which was dismissed. The Fourth Circuit held

> We think this was a case for the Commission, with the right of appeal to the South Carolina courts. The jurisdiction of the Commission over public utility rates is plenary. Even had Carolina Electric given to United the contract claimed by United, this contract would have required approval by the Commission.

United Merchants, 208 F.2d at 687. Like *United,* the resolution of the dispute is a regulatory matter which has been placed within the original jurisdiction of the Commission and over which the courts have no jurisdiction except by way of review.

2. THE COMMISSION HAS THE PRIMARY RESPONSIBILITY FOR OVERSEEING CONTRACTUAL RELATIONSHIPS UNDER PURPA.

Congress delegated to the State Commissions the primary responsibility for implementing PURPA. See 16 U.S.C.A. § 824a-3(f). "[T]he states play the primary role in calculating avoided costs and *in overseeing the contractual relationships between QFs and utilities….*" *Independent Energy Producers Ass'n, Inc. v. CPUC*, 36 F.3d 848, 856 (9th Cir. 1994) (emphasis added).

FERC's Policy Statement Regarding the Commission's Enforcement Role under Section 210 of PURPA indicates that Section 210(h) authorizes FERC to "undertake an enforcement action to require a State regulatory authority...to implement the Commission's [QF] regulations." Policy Statement, 23 FERC P 61,304, 1983 WL 39627 at *2 (copy attached). Congress also provided for *judicial review* of PURPA proceedings conducted by the State regulatory authority. "*Judicial review* may be obtained respecting any proceeding conducted by a State regulatory authority or nonregulated electric utility for purposes of implementing any requirement…." 16 U.S.C.A. § 824a-3(g). The authority to implement the PURPA rules and oversee contractual relationships was delegated to the states, not FERC. FERC is to ensure implementation via its enforcement powers which include judicial review after state regulatory proceedings.

Several appellate courts have held that state regulatory agencies play the primary role in overseeing contractual relationships under PURPA. See *Independent Energy Producers Assoc. v. California PUC*, 36 F.3d 848, 856 (9th Cir. 1994); *North American Natural Resources Inc. v. Michigan Public Service Com'n*, 73 F.Supp. 2d 804, 807 (W.D. Mi. 1999) *vacated on other grounds*, 252 F.3d 808 (6th Cir. 2001). "State agencies are actively involved in the formation and performance of contracts between traditional utilities and QFs…." *Crossroads Cogeneration Corp. v. Orange & Rockland Utilities, Inc.*, 159 F.3d 129, 132 (3rd Cir. 1998).

SCE&G argues that Commission approval is not required and cites several cases involving breaches of contracts. The Third Circuit Court of Appeals distinguished this line of precedent in a case squarely on point based on federal law. "As we understand the federal law applicable here, although a PURPA-governed agreement is *unenforceable prior to approval by the relevant state agency*, the rights of the parties, once their agreement receives such approval, are to be determined by applying normal principles of contract interpretation to their agreement." *Crossroads Cogeneration Corporation v. Orange & Rockland Utilities*, 159 F.3d 129, 139 (3rd Cir. 1998) (emphasis added). In *Crossroads,* the court noted that the New York Public Service Commission carefully drew a distinction between interpreting the PURPA agreement between the parties and interpreting *its approval* of a PURPA agreement.

> As was recently reaffirmed, it is within our authority to interpret our power purchase contract *approvals,* and that jurisdiction has been upheld by the courts. *The precedents involving interpretation of past policies and approvals,* and, *not the contract non-interference policy, that Crossroads cites, control here.* As a result, *the approval of the original contract* for the Crossroads site may be explained and interpreted, and O&R's petition may be construed as requesting that relief.

Crossroads, 159 F.3d at 138.

Florida's Supreme Court addressed the issue of whether the Florida Public Service Commission had jurisdiction to determine whether a PURPA contract was invalid or whether contract interpretation should be left to the courts. *Panda-Kathlee, LP v Clark*, 701 So.2d 322, 325 (Fla. Sup. Ct. 1997) (copy attached). The court concluded that PURPA contemplates and authorizes the state commission's exercise of jurisdiction to resolve controversies concerning the construction of conflicting provisions in a standard offer contract. *Id.* at 326.

The California Public Utilities Commission has also addressed issues of contract interpretation in regard to implementing PURPA's requirements for QFs. *See Ultrapower-Rocklin v. Pacific Gas & Electric Co.*, 43 CPUC2d 137, Case No. 91-04-013 (Cal. PUC Jan. 10, 1992) (copy attached). The New York Supreme Court upheld the New York Public Service Commission's interpretation of a PURPA contract in *Matter of Indeck-Yerkes Energy Services v. PSC of NY*, 164 A.D.2d 618 (N.Y. Sup. Ct., App. Div. 1991) (copy attached). In another opinion, the New York Public Service Commission indicated that "it is within our authority to interpret our power purchase contract approvals, and that jurisdiction has been upheld by the courts. The precedents involving interpretation of past policies and approvals, and not the contract non-interference policy that Crossroads cites, controls here." *Re: Orange and Rockland Utilities, Inc.*, 1996 WL 707459, *3, Case 96-E-0728 (Nov. 29, 1996) (copy attached).

SCE&G cites numerous cases involving breach of contract claims involving contract disputes over prices and terms. That is not the issue presented by Columbia Energy's petition for a declaratory ruling. Columbia Energy seeks a declaration that its waiver of certain PURPA rights is not enforceable. FERC has indicated that a company "cannot lawfully bargain away any portion of the rights QFs enjoy under PURPA or NHEC's statutory purchase obligations under PURPA, our implementing regulations....." *Public Service Co. of New Hampshire v. New Hampshire Electric Cooperative, Inc.*, 83 FERC P 61,224, 1998 WL 272964 *5 (FERC 1998) (copy attached). The issue here involves a waiver of basic rights under PURPA; and therefore, raises important regulatory considerations for the Commission.

As noted in one case cited by SCE&G, "[a] public utility has the right to enter into a private contract but the state can modify that contract when it falls outside the parameters of an appropriate standard." *Afton Energy v. Idaho Power Co.*, 729 P.2d 400, 404 (Id. Sup. Ct. 1986) (copy attached). If the Commission finds that an agreement is not fair, reasonable, in the public interest or in compliance with PURPA, the Commission may declare that agreement null and void. PSC Order No. 80-214, p. 7. See also *Anchor Point, Inc. v. Shoals Sewer Co.,* 308 S.C. 422, 418 S.E.2d 546, 549 (Sup. Ct. 1992) (Supreme Court affirmed the Commission's exercise of its authority to alter contracts pursuant to the State's police powers.

3. THE COMMISSION HAS JURISDICTION OVER THE SETTLEMENT AGREEMENT UNDER SOUTH CAROLINA STATUTES.

In addition to PURPA and the Commission's implementing orders cited above, there is statutory authority for exercising jurisdiction. S.C. Code Section 58-3-140 vests the Commission with the power and jurisdiction to supervise and regulate public utilities. Section 58-27-40 requires electric utilities to obey and comply with all requirements of every order, decision or regulation of the Commission. S.C. Code Section 58-27-990 authorizes the Commission to approve contracts between electrical utilities such as SCE&G and Columbia Energy. The Supreme Court affirmed the Commission's exercise of its authority to alter contracts pursuant to the State's police powers in *Anchor Point, Inc. v Shoals Sewer Co.*, 308 S.C. 422, 418 S.E. 2d 546, 549 (1992). These statutory provisions give the Commission primary jurisdiction over PURPA issues arising between electric utilities (like SCE&G) and qualifying facilities (like Columbia Energy).

S. C. Code Section 58-27-990 authorizes the Commission to approve contracts between electrical utilities such as SCE&G and Columbia Energy. In addition, the Commission specifically retained its jurisdiction to review any agreements between an electric utility and a qualifying facility as to reasonableness and compliance with the rules of the Commission and PURPA. Order No. 80-214, p. 7. If the Commission finds that an agreement is not fair, reasonable, in the public interest or in compliance with PURPA or the Commission's orders, the Commission may declare an agreement null and void. *Id.*

CONCLUSION

SCE&G's motion to dismiss should be denied since the Commission has primary jurisdiction over PURPA related issues such as those raised in Columbia Energy's petition for a declaratory ruling. Columiba Energy is not seeking a ruling as to SCE&G's breach of contract claim in the present petition. Columbia Energy's petition seeks a declaratory ruling from the Commission that the Settlement Agreement is unenforceable for several reasons including the fact that it was not approved by the Commission as required by S.C. Code Section 58-27-990 and the Commission's orders implementing PURPA. A failure to recognize the Commission's primary jurisdiction over Columbia Energy's petition flies in the face of every applicable authority and therefore SCE&G's motion should be denied.

Dated this 15 day of November, 2004.

ROBINSON, MCFADDEN & MOORE, P.C.

By: Bonnie D. Shealy

Frank R. Ellerbe, III
Bonnie D. Shealy
Post Office Box 944
Columbia, SC 29202
Telephone: (803) 779-8900
Facsimile: (803) 252-0724

Attorneys for Columbia Energy LLC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	OF THE FIRST JUDICIAL CIRCUIT
COUNTY OF CALHOUN		

2004 OCT 19 A 9:25

EDWARD S. GRIFFITH
CLERK OF COURT
CALHOUN COUNTY
SC

SOUTH CAROLINA ELECTRIC & GAS CO.,	)	CASE NO. 04-CP-09-95
	)	
Plaintiff,	)	
	)	**ORDER OF REMAND AND GRANTING STAY**
vs.	)	
	)	
COLUMBIA ENERGY LLC	)	
	)	
Defendant.	)	

This matter came before the Court on September 17, 2004, on the motion of defendant Columbia Energy LLC ("Columbia Energy") to dismiss the complaint on the grounds that this matter should be heard in the first instance by the South Carolina Public Service Commission ("Commission") pursuant to the doctrine of primary jurisdiction.

INTRODUCTION

This civil action involves a dispute between the parties arising out of a "Settlement Agreement" dated December 19, 2000 between plaintiff South Carolina Electric & Gas Co. ("SCE&G") and Columbia Energy which relates to the parties' rights under the federal Public Utility Regulatory Policies Act of 1978 ("PURPA"). In its original complaint in this action, SCE&G alleged causes of action for declaratory and injunctive relief. Columbia Energy responded with a motion to dismiss asserting that the issues raised in SCE&G's complaint are subject to the primary jurisdiction of the Public Service

Commission of South Carolina. On September 10, 2004, Columbia Energy filed with the Commission a petition for a declaratory order concerning the Agreement. On September 16, 2004, SCE&G filed an amended complaint which added claims for breach of contract and promissory estoppel. At the hearing on its motion to dismiss, Columbia Energy acknowledged that the Commission would not have jurisdiction over the breach of contract claim included in the amended complaint and requested that the present action be stayed pending the Commission's review of its petition for a declaratory ruling.

BACKGROUND

SCE&G is a South Carolina corporation which is engaged in the business of generating, transmitting and selling electric power. Columbia Energy operates a facility in Calhoun County, South Carolina, which generates electric power and steam. Columbia Energy was granted a Certificate of Environmental Compatibility and Public Convenience and Necessity on February 6, 2001 by the Commission to operate the Calhoun County facility. See Order No. 2001-108, PSC Docket No. 2000-487-E. The Commission's order found that the Calhoun County facility was a "Qualifying Facility" under PURPA pursuant to the rules and regulations of the Federal Energy Regulatory Commission ("FERC"). The Settlement Agreement which is at issue in this case arose from the participation of SCE&G in the Commission proceeding by which Columbia Energy was granted authority to operate the Calhoun County facility. In the Settlement Agreement, SCE&G agreed not to oppose certification of the facility in exchange for Columbia Energy waiving certain rights under PURPA. SCE&G now seeks to enforce the Settlement Agreement while Columbia Energy has asked the Commission to declare it to be unenforceable.

In enacting PURPA Congress delegated certain regulatory authority to the states. Section 210 of PURPA requires each state commission to implement regulations requiring electric utilities to interconnect with and purchase electric energy from Qualifying Facilities. 16 U.S.C.A. § 824a-3. In South Carolina, the Public Service Commission has responsibility for overseeing the implementation of PURPA. The Commission adopted a series of orders recognizing and delineating certain of the FERC requirements under PURPA in Docket No. 80-251-E, *Small Power Production and Cogeneration Facilities—Implementation of Section 210 of the Public Utility Regulatory Policies Act of 1978*. In Order No. 81-214, page 20, the Commission retained jurisdiction to review certain voluntarily negotiated agreements upon complaint by the affected electrical utility, the qualifying facility, or upon its own motion, and to declare the same null, void and unenforceable. Subsequent Commission Orders 85-347 and 89-56 in the same docket emphasized that the Commission's actions were designed to encourage cogeneration and small power production in South Carolina.

DISCUSSION

Columbia Energy argues that this Court should defer to the Public Service Commission to address PURPA issues arising in this case. The doctrine of primary jurisdiction has been recognized in South Carolina. See *Medical University of South Carolina v. Taylor,* 294 S.C. 99, 362 S.E.2d 881 (Ct. App. 1987). In that case the S.C. Court of Appeals held that where an administrative agency is vested with primary jurisdiction of an issue, the courts ordinarily will not grant injunctive relief prior to a decision by the agency. *Medical University of SC v Taylor*, 362 S.E.2d at 884.

In the leading case on primary jurisdiction, the United States Supreme Court noted that the doctrine of primary jurisdiction allocates law-making power over certain aspects of commercial relations by transferring from the court to the agency the power to determine some of the incidents of such relations. *U.S. v. Western Pacific Railroad Co.*, 352 U.S. 59, 65 (1956).

> The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. 'Exhaustion' applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. 'Primary jurisdiction,' on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

United States v. Western Pacific, 352 U.S. at 63-64. Application of the doctrine of primary jurisdiction in particular situations requires the consideration of three factors. See *Arkansas Louisiana Gas Co. v. Hall*, 7 FERC P61175, 30 PUR4th 224, 79 WL 167678, *reh'd denied*, 8 FERC 61031 (1979). Those factors are: (1) whether the agency possesses some special expertise which makes the case peculiarly appropriate for decision by the agency; (2) whether there is a need for uniformity of interpretation of the type of question raised in the dispute; and (3) the possibility of an adverse impact on the regulatory responsibilities of the administrative agency. *Id.*

In examining the first factor, it is beyond dispute that the South Carolina Public Service Commission has special expertise which makes it the appropriate forum to decide the PURPA related issues which arise in this case. Specifically, the Public Service Commission should have an opportunity to determine the question of whether under PURPA, or any state or federal regulation or decision, Columbia Energy has the ability to require SCE&G to purchase power despite the existence of the Settlement Agreement. The Public Service Commission should have the opportunity to address, should the Commission deem it necessary, public policy questions concerning the permanent enforceability of waiver agreements like the Settlement Agreement.

The next consideration is whether this case is one which presents an issue which requires uniform interpretation. This consideration again favors referral to the Commission. The Commission has been vested under Congress' regulatory scheme with broad responsibility for implementing PURPA. The Public Service Commission should be given the opportunity to address the questions raised in this case as to the formation and enforceability of the Settlement Agreement because they are fundamental to the application of PURPA and capable of repetition. A decision by the Commission on this issue has the potential to be known to and followed by other utilities and Qualifying Facilities.

The final consideration is the possibility of an adverse impact on the regulatory responsibilities of the Commission. In its docket implementing PURPA in South Carolina, the Commission specifically retained jurisdiction over certain agreements between electrical utilities and Qualifying Facilities as to "[those contracts'] reasonableness and compliance with the rules of the Commission and PURPA." Order

No. 81-214, p.7, Docket No. 80-251-E. The dispute in this action includes questions concerning the reasonableness and compliance of the Settlement Agreement with PURPA and the Commission's rules concerning implementation of PURPA. As an example, one issue presented here is whether the Settlement Agreement should have been submitted for approval to the Commission. Because the Commission's efforts to regulate PURPA matters may be directly affected by the answer to that question, the Commission should have the opportunity to address this issue. This Court finds that failure to apply the doctrine of primary jurisdiction here may well have an adverse impact on the regulatory responsibilities of the Commission. This factor favors referral to the Commission.

The doctrine of primary jurisdiction enables the Court to refer a matter to an agency and to stay further proceedings so the parties have a reasonable opportunity to seek an administrative ruling. *Reiter v. Cooper*, 507 U.S. 258, 268 (1993). Upon consideration of the factors outlined above, I find and conclude that pursuant to the doctrine of primary jurisdiction the present action should be referred to the Commission and stayed while the Commission considers the issue referred to it by the Court. This Court will retain jurisdiction over this case so that any issues which remain, including the claims, can be addressed in light of rulings by the Commission on matters in this case, if any, within its particular jurisdiction. The Court notes that should the Public Service Commission decide that it lacks jurisdiction over the issue referred to it by this Court, then the Court will itself address all of the issues raised in the instant case.

WHEREFORE, it is

ORDERED that this matter is remanded to the Public Service Commission consistent with this Order, and it is further

ORDERED that the present action is stayed until such time as the Public Service Commission (1) determines whether it has jurisdiction to decide the issue referred to it by this Court; and (2), if so, issues a decision addressing whether under PURPA, or any state or federal regulation or decision, Columbia Energy has the ability to require SCE&G to purchase power despite the existence of the Settlement Agreement. The parties shall advise the Court of the Commission's decision within ten (10) days after receiving notice thereof.

IT IS SO ORDERED.

October 14, 2004
St. George, S.C.

Steven H. John
Presiding Judge
First Judicial Circuit

H

**1 Commission Opinions, Orders and Notices

Arkansas Louisiana Gas Company

v.

Frank F. Hall, et al.

Docket No. RI76-28

Order Declining Jurisdiction After Reconsideration of the Issue on Remand

[Note: Order denying rehearing issued July 16, 1979, 8 FERC P .]

May 18, 1979

***61321** Before Commissioners: Charles B. Curtis, Chairman; Don S. Smith, Matthew Holden, Jr. and George R. Hall.

I

A QUESTION OF JURISDICTION

In this case this Commission [FN1] is faced with a question of jurisdiction. Should this Commission exercise jurisdiction to the exclusion of state courts to determine whether a royalty agreement between a gas utility and the United States is a 'purchase [of gas] from another party-seller' that triggers an automatic price increase under the 'most favored nation clause' in a gas supply contract between the utility and certain independent producers of gas? [FN2]

II

HISTORY OF PROCEEDINGS

A. The Parties

Frank J. Hall, et al., are a group of independent producers of natural gas. Under a 1952 contract with the Arkansas-Louisiana Gas Company ('Arkla'), if Arkla purchases gas from any other producer in the same gas field at a higher price for gas than it pays the Hall group under the contract, Arkla must pay the Hall group that higher price. This contractual provision, known as a most favored nation clause, provides:

If at any time during the term of this agreement buyer should purchase from another party-seller gas produced from the subject wells or any other well or wells located in the Sligo gas field at a higher price than is provided to be paid for gas delivered under this agreement, then in such event the price to be paid for gas thereafter delivered hereunder shall be increased by an amount equal to the differences between the price provisions hereof and the concurrently effective higher price provisions of such subsequent contract.

B. The State Court Proceedings

In 1974, the Hall group sued Arkla for breach of contract in a Louisiana State court [FN3] claiming that royalty payments made to the United States by Arkla since 1961 under a gas supply arrangement ***61322** with the government had triggered the most favored nation clause. The Hall group claimed that they were entitled to damages retroactive to 1961.

In October 1977, the state court found for the Hall group and awarded substantial damages.

On appeal, the Court of Appeals of Louisiana, Second Circuit, [FN4] held that: (1) The trial court had proper subject matter jurisdiction. Jurisdiction was not exclusive in the FERC under the Natural Gas Act. And the FERC does not have primary jurisdiction to determine whether the favored nation clause was activated by the royalty payment to the United States. (2) The favored nation clause was activated by the royalty payment because the royalty payment was tantamount to a 'purchase from another party-seller.' [FN5] The court remanded the case to the trial court for recalculation of damages. Arkla petitioned the Supreme Court of Louisiana for certiorari. The Supreme Court of Louisiana denied the petition. [FN6] Arkla has petitioned the Supreme Court of the United States for certiorari.

****2** C. Action Before the FPC

After the Hall group first filed suit in state court, Arkla applied to the FPC for a declaratory order construing the favored nation clause contained in its contract with the Hall group.

Before the FPC, Arkla argued that the FPC had exclusive jurisdiction over the dispute. The FPC [FN7] held:

There is no question that sales of natural gas by [the Hall group] to Arkla are subject to the jurisdiction of the Commission.

However, there is a threshhold question as to the contractual basis of [the] rates. It has been Commission policy to defer action on contract questions presented to its involving jurisdictional sales which are pending in court * * *. This case presents a question of concurrent jurisdiction * * *. While this Commission has jurisdiction to decide the subject contract question, the Louisiana court also has jurisdiction over an action based upon asserted breach of contract. Accordingly, we believe it appropriate to defer to the court to decide these contract questions.

On Arkla's application for rehearing, the FPC ruled [FN8] that even if the state court held that the Hall group was entitled to a higher rate under the favored nation clause, they, as jurisdictional sellers, would still be limited to ceiling rates in effect under the Commission's Regulations. The FPC also noted that since the producers held a small producer certificate effective October 19, 1972, they were not required to make any rate increase filings thereafter.

On February 3, 1977, Arkla petitioned the U.S. Court of Appeals for the District of Columbia Circuit for review of the FPC's orders.

D. Actions By The FERC

On March 21, 1978, the FERC moved in the U.S. Court of Appeals for an order remaining the record in these proceedings to the FERC for further consideration.

On May 25, 1978, the Court of Appeals granted the Commission's motion and remanded the record to the Commission.

On August 9, 1978, [FN9] the Commission asked for briefs directed towards the question of

'whether this Commission has primary jurisdiction over these matters, and if so, whether this Commission should exercise such jurisdiction in the circumstances presented here.'

The Commission noted that the briefs should not discuss the merits of the case but should limit the discussion to the jurisdictional issues.

IV.

DISCUSSION

As noted above, the FPC declined to issue a declaratory order construing the most favored nation clause in the Arkla-Hall contract. It held that there was concurrent jurisdiction with the state court and that it would defer to that court.

The FPC stated that there is a '[c]omission policy to defer action on contract questions presented to it involving jurisdictional sales which are pending in state court.' [FN10]

While we concur in the result reached by the FPC, we do not subscribe to its rationale. Whether the Commission should assert jurisdiction over contractual issues otherwise litigable in state courts, depends, we think, on three factors. Those factors are: (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised by the dispute; and, (3) whether the case is important in relation to the regulatory responsibilities of the Commission. We believe the FPC's automatic policy of deferral of contract questions pending in state courts to the state courts was erroneous.

****3** In examining whether this Commission has a special expertise which makes it the appropriate forum to decide whether the Arkla-Hall favored nation clause has been triggered, we note initially that the Commission is, in general, no more expert than a court in deciding non-technical contact questions. However, interpretation of some types of contractual clauses may involve examination of technical issues which are within this Commission's special expertise. Determination of the dispute between Arkla and the Hall group depends upon finding that Arkla has 'purchase[d] from another party-seller gas produced from the subject wells or any other wells located in the Sligo gas field at a higher price than is provided to be paid for gas ***61323** delivered under this agreement.' While there are circumstances where the interpretation of a favored nation clause may involve this Commission's technical expertise, [FN11] we have been presented with no issue in this case involving our special expertise. Arkla makes no argument in this case that would involve our technical expertise. Arkla's defense to the contract action is that the royalty agreement between itself and the United States is not a 'purchase from another party-seller' which triggered the favored nation clause. The outcome of the case appears to turn on interpretation of the intent of the parties to the contract rather than any determination requiring special technical expertise. We therefore see no reason to exercise our jurisdiction based upon a finding that the case involves a matter within our special expertise.

We next consider whether this case is one in which there is an issue which requires uniform interpretation. We consider the need for uniformity in light of the policies Congress has charged this Commission to administer. In this regard we must consider that transactions subject to the Natural Gas Act rest in large part on private contracts and that the Commission's role with respect to such contracts should intrude no further into doctrines of state contract law than necessary to carry out the responsibilities under the Natural Gas Act. [FN12] While this 'Commission has plenary authority to limit or proscribe contractual arrangements that contravene the relevant public interests,' [FN13] and to this end in appropriate cases, might find that achievement of the purposes of the Natural Gas Act requires that certain terms in contracts should be uniformly interpreted, we do not believe this to be such a case.

In this case this Commission is being asked to interpret a favored nation clause. The dispute is whether under the contract a royalty agreement is a 'purchase [of gas] from another party-seller' that triggers an automatic price increase under the favored nation clause. In the circumstances of this case whether a 'purchase' occurred within the meaning of the contract depends upon what type of transactions the parties to the contract intended 'purchase' to include. [FN14] What 'purchase from another party-seller' means in one gas supply contract does not necessarily mean the same thing in another gas supply contract. The makers of one contract may have intended the favored nation clause to be triggered by events other than those intended to triggered the clause in another contract. Since the meaning of a favored nation clause depends upon the intentions of the parties to the contract, we see no need for uniform interpretation of all favored nation clauses. Indeed, uniform interpretation would seem to be impossible.

****4** It has been argued that the interpretation of this contract may have involved a state court in determining whether a 'sale' had occurred. And the interpretation of the word 'sale,' it was argued, would involve a state court in the interpretation of an important term defining this Commission's jurisdiction over gas. [FN15] But this case does not involve determining jurisdiction over gas. We undisputedly have jurisdiction over the gas involved in this case. This case involves contract interpretation. And it is clear that the word 'sale' may have a different meaning in a contract than it does under that section of the Natural Gas Act conferring jurisdiction upon this Commission. 'The same words, in different settings, may not mean the same thing.' [FN16]

Finally, in considering the need for uniformity, we look at the fact that the contracts between Arkla and the Hall group were entered into long before this Commission became actively concerned with the indefinite price escalation clauses, and more particularly with favored nation clauses. The contract in question was entered into in 1952. Not until 1961 did the FPC issue regulations concerning most favored nation clauses. [FN17] Indeed, in contracts executed after April 3, 1961, most favored nation clauses are prohibited. Since these contracts were entered into before the FPC issued regulations concerning favored nation clauses, the makers had no guidance from the Commission in drafting the clauses. Since at the time, no Commission policy existed requiring uniformity, the meaning of the clauses was left to the intentions of the parties. Ascertainment of such intentions is a matter of case-by-case adjudication that does not invoke the considerations of uniformity or technical expertise that would, in other circumstances, support assertion of this Commission's primary jurisdiction.

Finally, we must decide now what impact this case has on our regulatory responsibilities. This type of case, involving small producers not required by regulation under the Natural Gas Act to file for rate increases authorized by contract, [FN18] is not a matter of great import to our regulatory responsibility as we find no need for a uniform interpretation of a contractual provision, and find that the rates requested are within what the Commission has determined to be the zone of reasonableness.

On the facts of this case, the damages do not exceed applicable area ceiling rates. [FN19] The Louisiana Supreme Court concluded that the Hall group was entitled to damages measured by the difference between the price Arkla paid the United States under the royalty agreement and the price it paid the Hall group. [FN20] In so doing, it noted that it considered the fact that the Commission, in previous orders in this case, had stated the maximum rates to which the Hall group would have been entitled if contractually authorized and if proper filing procedures had been followed. [FN21] The Supreme Court of Louisiana further stated:

****5** We note that plaintiffs make no claim that they would have been entitled to a price increase under their contract in excess of the respective area base rate ceilings for sales of natural gas as established by order of the Commission. [FN22]

***61324** In light of the fact that the Hall group makes no claim for damages higher than the applicable area ceiling rates, that the Louisiana Supreme Court did not authorize rates higher than the applicable area ceiling rates, and that the state district court on remand from the Louisiana Supreme Court will presumably not award damages higher than the area ceiling rates, we do not feel that our regulatory responsibilities are so affected that we must exercise our jurisdiction in this case.

Since we find that we need not exercise jurisdiction under any of the three applicable factors, we decline jurisdiction.

The Commission orders:

Upon review on remand, we decline to exercise jurisdiction on this matter for the reasons stated above.

FN1 These proceedings were commenced before the FPC. By joint regulation of October 1, 1977 (10 CFR 1000.1), they were transferred to the FERC. The term 'Commission,' when used in the context of action taken prior to October 1, 1977, refers to the FPC; when used otherwise, to the FERC.

FN2 Arkansas Louisiana Gas Company v. Frank J. Hall, et al., Docket No. RI76-28, Order Setting Matter for Determination on Brief, August 9, 1978, 4 FERC P61,133. This is not the first time we are facing this case. The FPC first addressed the jurisdiction question in an order dated March 8, 1976, 55 FPC 1018. The FPC's previous actions in this case are discussed more fully in Section II, infra, pp. 4-5.

FN3 Hall v. Arkansas Louisiana Gas Company, 1st Judicial District Court, Caddo County, Louisiana, No. 225,699.

FN4 Hall v. Arkansas Louisiana Gas Company, 359 So.2d 255 (May 1, 1978).

FN5 The Court so found despite its recognition that the theory of ownership advanced by Arkla was:

... in accord with the prevailing state law and federal decisions on this issue. See Shell Petroleum Corp. v. Calcasieu Real Estate & O. Co., 185 La. 751, 170 So. 785 (1936); Logan v. State Gravel Co., 158 La. 105, 103 So. 526 (1925); Board of Com'rs. of Caddo Levee Dist. v. Pure Oil Co., 167 La. 801, 120 So. 373 (1929); Melancon v. Texas Company, 230 La. 593, 89 So.2d 135 (1956). Mobil Oil Corporation v. Federal Power Commission, 149 U.S.App.D.C. 310, 463 F.2d 256 (1971), cert. den. 406 U.S. 976, 92 S.Ct. 2413, 32 L.Ed.2d. 676 (1972).

The Court concluded that the intentions of the parties were not to limit the activation of the favored nation clause only to situations where there was a technical 'purchase,' 'seller,' or 'price.' The Court decided that royalty payments were within the intentions of the parties when they drafted the favored nation clause.

FN6 A related petition for certiorari was also filed by the Hall group. The Hall group petition was granted for the limited purpose of considering the level of damages and whether one member of the group had waived his right to damages. The Louisiana Supreme Court on March 5, 1979, issued its decision on those matters. It has awarded damages for the period 1961 to 1972 which the Court of Appeals had rejected.

FN7 Arkansas Louisiana Gas Company v. Frank J. Hall, et al., Docket No. RI76-28, Order Denying Petition (March 8, 1976).

FN8 Arkansas Louisiana Gas Company v. Frank J. Hall, et al., Docket No. RI76-28, Order Denying Application for Rehearing (issued June 4, 1976, 55 FPC 2660). In these proceedings, the FPC issued other orders which are not relevant at this time.

FN9 Arkansas Louisiana Gas Company v. Frank J. Hall, et al., Docket No. RI76-28, Order Setting Matter for Determination on Brief.

FN10 Order Denying Petition (March 8, 1976) at 1020.

FN11 See Pure Oil Company v. F.P.C., 299 F.2d 370 (7th Cir., 1962). In that case the interpretation of a favored nation clause involved the issue of whether certain purchased gas possessed exceptional qualities for peaking purposes which enhanced its value to the extent that a seemingly triggering price was not higher on a comparative basis than the prices paid under the contract.

FN12 See United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332, 343-344 (1956); United Gas Pipe Line Co. v. Memphis Gas Div., 358 U.S. 103, 109-110, 112-114 (1958).

FN13 Permian Basin Area Rate Cases, 390 U.S. 747, 784 (1968).

FN14 The Louisiana court property looked to the intentions of the parties to the contract in determining the meaning of the contract. See n. 2, p. 3.

FN15 This Commission's jurisdiction extends to 'the sale of natural gas in interstate commerce for resale.' Section 1(b) of the Natural Gas Act, 52 Stat. 821, 15 U.S.C. 717(b).

FN16 Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 678 (1950).

FN17 18 CFR 154.93.

FN18 The Hall Group holds small producer certificates which exempt it from certain rate filing requirements. See 18 CFR 157.40. But for this status, the group would have been required, under the filed rate doctrine, to apply for and receive approval of any change in its rates on file with this Commission before it could collect any price increase claimed to have been triggered under the favored nation clause. Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246, 251 (1951). Moreover, whether the group held small or large producer status, such increases could have been recovered only prospectively. Id. However, because a small producer is exempt from rate filing requirements and could commence collection of contractually authorized rates on demand to the buyer, a court would be capable of finding an award of damages for the difference between a rate permitted by the contract, up to applicable limits provided by the Commission for small producers, and amounts actually collected.

Prior to 1972 the Hall group did not hold small producer certificates. In the 'Order Denying Application for Rehearing' issued June 4, 1976, the FPC stated on p. 2660, n. 1:

Prior to the filing of their small producer application, respondents, of course, as ARKLA contends, would be entitled under the Natural Gas Act only to the rate on file with this Commission and in effect. See Samedan Oil Corp., et al., 37 FPC 267, and cases cited therein.

The FPC held that the producers were not entitled to a rate increase for the period prior to when they held small producer certificates since they had not filed for a rate increase as required by Commission Regulation. The Louisiana Supreme Court, however, has awarded damages back to 1961. It concluded that it was Arkla's fault that the Hall group has not filed for a rate increase prior to 1972. The Louisiana Court therefore deemed that the Hall group had fullfilled its obligation to file new rate schedules. On this basis the Louisiana Supreme Court awarded damages for the 1961 to 1972 period after the favored nation clause was found to have been triggered and before the Hall group received small producer certificates.

It is our opinion that the Louisiana Supreme Court's award of damages for the 1961-1972 period violates the filed rate doctrine. Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246, 251 (1951). This Commission, however, does not have the power to review what the state court has done. We note, however, that a petition for a writ of certiorari has been filed in the Supreme Court of the United States seeking review of the Louisiana Supreme Court's decision. Arkla v. Hall, Sup. Ct. No. 78-986, filed December 18, 1978.

FN19 On April 25, 1979, 7 FERC P , we issued an 'Order Requesting Additional Information to Supplement Record.' Information received pursuant to that request confirms that damages do not exceed applicable area ceiling rates. Arkla contends that damages do exceed the applicable area ceiling rates. Arkla claims that the Louisiana courts erroneously awarded damages for liquefiable hydrocarbons. In this Commission's November 8, 1976, 'Order Clarifying and Amplifying Commission Order Denying Rehearing' we stated:

While the Commission has jurisdiction over natural gas containing liquefiable hydrocarbons, it has no jurisdiction over liquids after their removal from the gas stream. Consequently, if a contract provides for severable payments for the natural gas, including the liquefiable hydrocarbons contained therein, and the subsequently removed liquids, we would have jurisdiction over the sale of the natural gas containing the liquefiable hydrocarbons, but no jurisdiction over the sale of the liquids. But, there is a basic contract question presented with respect to the subject sale as to whether respondents are entitled under the sales contract to a price for the products removed by ARKLA from the natural gas purchased from respondents which is severable from the price for natural gas sold under such contract.

The Louisiana courts found that the contract provided for a price for the products removed from the gas severable from the price for the gas sold under the contract. The damages awarded for the actual natural gas, not including the severable payment for the products removed, was within the area ceiling rate.

FN20 As we stated above, the Louisiana Supreme Court, in effect, waived one of this Commission's filing requirements when it determined that the Hall group was entitled to damages back to 1961. This holding of the Louisiana Supreme Court conflicts with the filed rate doctrine.

FN21 Frank J. Hall v. Arkansas Louisiana Gas Company, Supreme Court of Louisiana (March 5, 1979), slip op. p. 11. The Commission's previous orders were its Order Denying Application For Rehearing, (June 4, 1976); and Order Clarifying And Amplifying Commission Order Denying Application For Rehearing (November 8, 1976, 56 FPC 2905).

FN22 Supreme Court of Louisiana, slip op. p. 12, n. 7.

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30 P.U.R.4th 224, 7 FERC P 61,175, 79 WL 167678 (F.E.R.C.)

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23 FERC P 61,304
23 FERC P 61,304, 1983 WL 39627 (F.E.R.C.)
(Cite as: 23 FERC P 61304, 1983 WL 39627 (F.E.R.C.))

C

****1** Commission Opinions, Orders and Notices

Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978

Docket No. PL83-4-000

Statement of Policy

(Issued May 31, 1983)

***61643** Before Commissioners: Georgiana Sheldon, Acting Chairman; J. David Hughes, A. G. Sousa and Oliver G. Richard III.

In this document, the Commission is defining the role it intends to assume in enforcing the provisions of section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA) and defining the relationship of its enforcement authority to State judicial enforcement authority. The purpose of this document is to clarify our view of our appropriate place in an apparently ambiguous statutory enforcement scheme and to inform affected persons of the forums available if the PURPA requirements are not fulfilled. This document does not constitute a change in policy or a determination on the merits of any case.

Background

Under section 210 of PURPA, the Commission is required to promulgate rules which encourage the development of cogeneration and small power production. Among other things, the Commission's rules are to require electric utilities to purchase power from, and sell power to, facilities which qualify as cogeneration or small power production facilities under section 201 of PURPA. The Commission is also authorized to exempt certain qualifying cogeneration and small power production facilities from the provisions of the Federal Power Act, the Public ***61644** Utility Holding Company Act of 1935, and certain State laws. The Commission's regulations promulgated under sections 201 and 210 of PURPA are codified at 18 C.F.R. Part 292.

Under section 210(f) of PURPA, State regulatory authorities and nonregulated electric utilities are required to implement the Commission's rules described above. The Commission has indicated that the obligation to implement section 210 rules is a continuing obligation. This requirement may be fulfilled either: 1) through the enactment of laws or regulations at the State level; 2) by application on a case-by-case basis by the State regulatory authority, or nonregulated utility, of the rules adopted by the Commission; or, 3) by any other action reasonably designed to implement the Commission's rules.

Sections 210(g) and (h) of PURPA provide judicial review and enforcement procedures and Commission enforcement procedures respectively. Generally, these review and enforcement mechanisms are available to ensure that State regulatory authorities and non-regulated electric utilities undertake implementation of the Commission regulations.

Section 210(g)(1) of PURPA provides for judicial review, generally to be pursued in a State court forum, [FN1] respecting any proceeding conducted by a State regulatory authority or nonregulated electric utility for the purpose of implementing the requirements of section 210(a) of PURPA. Section 210(g)(2) authorizes any person to bring an action against any electric utility, qualifying small power producer, or qualifying cogenerator, to enforce any requirement established by a State regulatory authority or nonregulated electric utility pursuant to section 210(f).

****2** Section 210(h)(1) of PURPA grants the Commission certain enforcement authority with regard to those rules promulgated under section 210(a) which constitute "operations" under Part II of the Federal Power Act. As will be discussed more fully below, this authority applies only in limited circumstances. Section 210(h)(2) of PURPA authorizes the Commission to undertake an enforcement action to require a State regulatory authority or nonregulated electric utility to implement the Commission's regulations. As an important adjunct to this enforcement authority, section 210(h)(2) also authorizes certain private enforcement actions for the purpose of compelling implementation.

The Commission has previously addressed these review and enforcement provisions in the preamble to Order 69. [FN2] This policy statement is intended as a supplement to that discussion. It will identify some of the major causes of action which may arise under section 210 of PURPA and discuss the Commission's view of the forums in which the variety of actions should be pursued. This list is not intended to be exhaustive, and the Commission will entertain further inquiries on a case-by-case basis.

The Commission does not intend for this statement to have any effect other than to further inform the public of our views and the course we intend to follow in future proceedings. This statement has no legal effect, is not a rule or a binding norm, and imposes no rights or obligations. Therefore, as these issues arise in future proceedings the validity and application of the policies enunciated herein may be subject to further consideration.

Obligation to commence implementation

Under section 210(f) of PURPA, State regulatory authorities and nonregulated electric utilities are required to implement regulations promulgated by this Commission under section 210(a) of PURPA. Under section 210(h)(2)(A) the Commission has the authority to require the commencement of implementation under subsection (f) by any State regulatory authority or nonregulated electric utility. Moreover, the Commission's authority under this subsection extends to situations where State regulatory authorities or nonregulated electric utilities are alleged to have completed the implementation process, but have promulgated regulations which are inconsistent with or contrary to the Commission's regulations. Thus, for example, an allegation that a State regulatory authority has promulgated regulations which include a purchase rate standard contrary to existing Commission regulations would properly lie either before this Commission or before a judicial forum of proper jurisdiction. [FN3]

As we have already noted, [FN4] the Commission believes that its jurisdiction to review and enforce the section 210(f) implementation requirement (i.e., the requirement that State regulatory authorities and nonregulated electric utilities promulgate rules consistent with the requirements established by this Commission under section 210(a) of PURPA) is not exclusive. In fact, we would anticipate that generally proceedings would be initiated at the State level.

****3** The Commission may undertake an enforcement action either on its own motion or upon petition by an electric utility, qualifying cogenerator, or qualifying small power producer. If the Commission chooses to undertake an action to require the commencement of implementation, both State regulatory authorities and nonregulated ***61645** electric utilities are to be treated as persons under the Federal Power Act. The Commission's regulations establishing the implementation requirement of section 210(f) of PURPA [FN5] will be treated as rules under the Federal Power Act.

The Commission is not required to undertake an enforcement action described above. If the Commission does not initiate an enforcement action by notice within 60 days after receipt of a petition from an electric utility, qualifying cogenerator, or qualifying small power producer, the petitioner may bring an action in the appropriate United States district court. We anticipate that such an enforcement action would be an investigation to determine whether there are grounds for the Commission to seek court enforcement. The Commission is entitled to intervene as a matter of right in any private enforcement action under this section.

Implementation procedures

The implementation provisions of section 210(f) of PURPA contain certain statutory procedural requirements--viz., notice and an opportunity for public hearing. The Commission has the authority under section 210(h)(2)(A) of PURPA to enforce these statutory procedural requirements. Thus, a person alleging that a State regulatory authority or nonregulated electric utility has not issued notice or offered an opportunity for public hearing prior to promulgating regulations under section 210(f) of PURPA may petition the Commission to seek enforcement of these requirements. For purposes of any such enforcement action, the Commission's regulations implementing these procedural requirements will be treated as rules under the Federal Power Act.

The Commission notes that its enforcement jurisdiction in this regard is not exclusive. Section 210(g)(1) provides that any person may seek judicial review of any proceeding conducted by a State regulatory authority or nonregulated electric utility without petitioning this Commission. This provision appears to include procedural as well as substantive judicial review. Moreover, procedural challenges may be raised independently under applicable provisions of State law. Indeed, the Commission's authority to enforce PURPA procedural requirements is limited to those circumstances where an allegation is made that a State regulatory authority or nonregulated electric utility has failed to provide notice or an opportunity for public hearing as required by section 210(f). All other procedural challenges should be directly addressed to the proper judicial forum, rather than to this Commission.

Application of State regulatory authority or nonregulated electric utility established rules

The Commission perceives that its primary role in the statutory scheme of review and enforcement is to ensure that the State regulatory authorities and nonregulated electric utilities implement regulations under section 210(f) which are consistent with the regulations established by the Commission under section 210(a) of PURPA. However, once the State regulatory authorities and nonregulated electric utilities have appropriately implemented the Commission's regulations, the Commission's role is limited regarding questions of the proper application of these rules on a case-by-case basis. [FN6]

****4** Section 210(g)(2) states that "any person (including the Secretary [of Energy]) may bring an action against any electric utility, qualifying small power producer, or qualifying cogenerator to enforce any requirement established by a State regulatory authority or nonregulated electric utility pursuant to subsection (f)." This subsection provides the primary enforcement authority by which an aggrieved person may challenge the application of a rule or rules promulgated by a State regulatory authority or nonregulated electric utility.

The following are examples of causes of action which may arise under section 210(g)(2) of PURPA. Assume that a State regulatory authority has promulgated regulations under section 210(f) of PURPA which require electric utilities and qualifying facilities to negotiate a rate for purchase. The underlying State-established regulation is not at issue but, rather, a qualifying facility alleges that a particular electric utility, subject to the State regulatory authority's jurisdiction, refuses to negotiate. This allegation involves the application of a State-established rule and would properly lie before a State judicial forum of competent jurisdiction.

Similarly, where a nonregulated electric utility has promulgated rules appropriately implementing this Commission's regulations, and a qualifying facility alleges that a contract offered to it by the nonregulated utility contains unreasonable interconnection requirements, for example, this allegation is one which is properly raised under section 210(g)(2) before a State judicial forum, and not before this Commission. [FN7]

***61646** Exception for 30 to 80 megawatt small power production facilities.

The review and enforcement scheme described above contains an exception with regard to certain qualifying small power production facilities. Section 210(h)(1) of PURPA gives the Commission exclusive enforcement authority with regard to any rules prescribed by the Commission under section 210(a) of PURPA "with respect to any operations of an electric utility, a qualifying cogeneration facility or a qualifying small power production facility which are subject to the jurisdiction of the Commission under part II of the Federal Power Act." Pursuant to section 210(e) of PURPA, the Commission has granted liberal exemptions for all eligible qualifying facilities from part II of the Federal Power Act. [FN8] However, section 210(e)(2) of PURPA prohibits the Commission from exempting small power production facilities between 30 and 80 megawatts capacity, other than geothermal facilities, from the provisions of the Federal Power Act. The sales of power in interstate commerce by such facilities would, therefore, be an "operation" which is subject to this Commission's jurisdiction under Part II of the Federal Power Act.

Under Part II of the Federal Power Act, the Commission regulates, inter alia, sales of electric power in interstate commerce. The Commission therefore has the authority under the Federal Power Act to establish the rate for sale by such a facility. [FN9] Thus, the Commission may require that the rate for purchase by an electric utility from such a qualifying facility be consistent with the Commission-established rate.

****5** The Commission has determined that State-established rates which are consistent with the Commission's regulations will generally be accepted as the "just and reasonable" rate for purchases by electric utilities from Federal Power Act jurisdictional qualifying facilities under section 205 of the Federal Power Act. [FN10]

Conclusion

The above discussion represents the Commission's considered, but informal, position regarding its role under the review and enforcement mechanisms of section 210 of PURPA. The Commission is required to promulgate rules to encourage the development of cogeneration and small power production which the State regulatory authorities and nonregulated electric utilities are required to implement these rules. The State regulatory authorities and nonregulated electric utilities are required to implement the Commission's regulations. The Commission's regulations allow the States and nonregulated utilities a wide degree of latitude in establishing an implementation plan. Such latitude is necessary in order for implementation to accommodate local conditions and concerns, so long as the final plan is consistent with statutory requirements.

With regard to review and enforcement, the Commission's role is generally limited to ensuring that the State regulatory authority-or nonregulated electric utility-established implementation plan is consistent with section 210 of PURPA and with the Commission's regulations. Once this is ensured, the State judicial forums are available to ensure that electric utilities and qualifying facilities are dealing in good faith and in a manner consistent with locally-established regulation.

FNFNr Section 210(g) of PURPA states that judicial review and enforcement is obtained under the same requirements and in the same manner that an action would be brought under section 123 of PURPA.

Section 123(c)(1) of PURPA provides that judicial review and enforcement of determinations made by State regulatory authorities and nonregulated electric utilities may be obtained in the appropriate State court. Under section 123(c)(2) of PURPA, review of determinations made by a Federal agency may be obtained in the appropriate Federal court.

FNFNr Docket No. RM79-55, "Small Power Production and Cogeneration Facilities; Regulation Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978," [FERC Statutes and Regulations P 30,128], 45 Fed. Reg. 12214 (Feb. 25, 1980). (Hereinafter, Order 69.) The Commission stated that:

Section 210(g) of PURPA provides one of the means of obtaining judicial review of a proceeding conducted by a State regulatory authority or nonregulated utility for purposes of implementing the Commission's rules under section 210 . . . This means that persons can bring an action in State court to require the State regulatory authorities or nonregulated utilities to implement these regulations.

* * *

The Commission believes that review and enforcement of implementation under section 210 of PURPA can consist not only of review and enforcement as to whether the State regulatory authority or nonregulated electric utility has conducted the initial implementation properly, namely, put into effect regulations implementing section 210 rules or procedures for that implementation, after notice and an opportunity for a hearing. It can also consist of review and enforcement of the application by a State regulatory authority or nonregulated electric utility, on a case-by-case basis, of its regulations or of any other provision it may have adopted to implement the Commission's rules under section 210.

Section 210(h)(2)(A) of PURPA states that the Commission may enforce the implementation of regulations under section 210(f). The Congress has provided not only for private causes of action in State courts to obtain judicial review and enforcement of the implementation of the Commission's rules under section 210, but also provided that the Commission may serve as a forum for review and enforcement of the implementation of this program.

Id. at 12231.

FNFNr See note 2, supra.

FNFNr Id.

FNFNr 18 C.F.R. §292.401.

FNFNr In fact, the only area in which the Commission may get involved in questions regarding the application of rules is with regard to 30 to 80 megawatt small power production facilities. See discussion, infra.

FNFNr The Commission recognizes that nonregulated electric utilities are required to both implement the Commission's regulations and then comply with these self-established regulations. While this situation may seem anomalous, the Commission believes it appropriate to treat the nonregulated electric utility's regulatory function separately from its obligations as an electric utility. Thus, a challenge regarding the regulatory function of such an entity (e.g., that the nonregulated electric utility has not commenced implementation) would properly lie before this Commission under section 210(h) whereas a challenge regarding the application of regulations would not lie before this Commission.

FNFNr 18 C.F.R. §§292.601, 292.602 (1982).

FNFNr The Commission notes that sales by electric utilities to qualifying facilities are retail sales which are not "operations" under the Federal Power Act and are not, therefore, subject to Commission enforcement jurisdiction. Similarly, the interconnection requirement established in 18 C.F.R. §292.303(c) is not an "operation" under the Federal Power Act. See American Electric Power Service Corp. v. F.E.R.C., 675 F.2d 1226 (D.C. Cir. 1982) reversed and remanded -- U.S. -- (1983).

FNFN See Resources Recovery (Dade County), Inc., Docket No. ER82-225-000, et seq., orders issued March 12 [18 FERC P 61,243], May 24 [19 FERC P 61,188], and August 3, 1982 [20 FERC P 61,138]; Wheelabrator Frye, Inc., Docket No. EL82-7-000, order issued December 23, 1982; and Energy Conversions of America, Inc., Docket No. ER82-576-000, order issued December 23, 1982 [21 FERC P 61,329].

Federal Energy Regulatory Commission

23 FERC P 61,304, 1983 WL 39627 (F.E.R.C.)

END OF DOCUMENT

Briefs and Other Related Documents

Supreme Court of Florida.

PANDA-KATHLEEN, L.P./PANDA ENERGY CORPORATION, Appellant,
v.
Susan F. CLARK, et al., as the Florida Public Service Commission, and Florida Power Corporation, Appellees.

No. 88280.

Sept. 18, 1997.
Rehearing Denied Nov. 13, 1997.

Cogenerator which was developing qualifying facility (QF) under Public Utility Regulatory Policies Act (PURPA) appealed Public Service Commission (PSC) order determining, inter alia, that cogenerator's proposed facility did not comply with Commission regulation and that electric utility was only responsible to make firm capacity payments to cogenerator for 20-year period. The Supreme Court, Wells, J., held that: (1) Act did not preempt Commission's jurisdiction to resolve controversy over interpretation of standard-offer firm capacity and energy purchase contract between utility and cogenerator; (2) competent, substantial evidence supported Commission's finding that cogenerator's proposed 115-megawatt qualifying facility did not comply with regulation governing purchase of firm capacity and energy from qualifying facilities with less than 75 megawatts of capacity which was incorporated into contract; (3) Commission acted consistently with PURPA and with state statute and Commission regulations implementing Act and within its authority in determining that utility was required to make capacity payments to cogenerator for only 20 years and that cogenerator was responsible for supplying firm capacity for only 20 years under contract; and (4) utility's conduct and any understanding of parties contrary to Commission's regulations were irrelevant to Commission's enforcement of regulations and, thus, utility was not estopped by its alleged conduct from prevailing on its claims before Commission.

Affirmed.

Shaw, J., dissented.

West Headnotes

[1] Public Utilities ⚷194
317Ak194 Most Cited Cases
[1] Public Utilities ⚷195
317Ak195 Most Cited Cases
Supreme Court presumes orders of Public Service Commission (PSC) to be correct, and only determines whether Commission's action comports with essential requirements of law and is supported by competent, substantial evidence.
[2] Electricity ⚷8.4
145k8.4 Most Cited Cases
Public Utility Regulatory Policies Act (PURPA) did not preempt Public Service Commission's (PSC) jurisdiction to resolve controversy over interpretation of standard-offer firm capacity and energy purchase contract between electric utility and cogenerator which was developing qualifying facility (QF) as to allowable capacity of cogenerator's facility and length of utility's purchase obligation; such dispute resolution was type of activity in which Commission was engaged, and, in ruling upon contract, Commission did not engage in utility-type regulation from which Act exempted cogenerators. Public Utility Regulatory Act of 1978, § 210(e), 16 U.S.C.A. § 824a-3(e); West's F.S.A. § 366.051; Fla.Admin. Code Ann. r. 25-17.0832(3)(a).
[3] Public Utilities ⚷119.1
317Ak119.1 Most Cited Cases
[3] States ⚷18.73
360k18.73 Most Cited Cases
Public Utility Regulatory Policies Act (PURPA) preempts utility-type rate regulation of qualifying facilities (QF) by Public Service Commission (PSC). Public Utility Regulatory Act of 1978, §

210(e), 16 U.S.C.A. § 824a-3(e).

[4] Electricity 8.4

145k8.4 Most Cited Cases

Competent, substantial evidence supported Public Service Commission's (PSC) finding that cogenerator's proposed 115-megawatt qualifying facility (QF) did not comply with regulation governing electric utility purchase of firm capacity and energy from qualifying facilities with less than 75 megawatts of capacity which was incorporated into standard-offer capacity and energy purchase contract between electric utility and cogenerator; Commission's regulations and contract specified facility with capacity of less than 75 megawatts, and Commission had interpreted 75-megawatt threshold as applying to total net capacity of a qualifying facility rather than to committed capacity a qualifying facility sold pursuant to standard-offer contract. Fla.Admin. Code Ann. rs. 25-17.0832, 25-17.0832(3)(a).

[5] Public Utilities 194

317Ak194 Most Cited Cases

Supreme Court gives great deference to Public Service Commission's (PSC) interpretation of its own rules and will not disturb that interpretation unless interpretation is shown to be clearly erroneous.

[6] Electricity 8.4

145k8.4 Most Cited Cases

Commission acted consistently with Public Utility Regulatory Policies Act (PURPA) and with state statute and Commission's regulations implementing Act and within its authority in determining that electric utility was required to make capacity payments to cogenerator with respect to proposed qualifying facility (QF) for only 20 years and that cogenerator was responsible for supplying firm capacity for only 20 years under standard-offer capacity and energy purchase contract between utility and cogenerator, despite fact that Commission had approved contract with typewritten term of 30 years; Commission regulation incorporated into contract provided that duration of power delivery requirement was equal to anticipated plant life of utility's avoided power-production unit, contract provided that plant life of avoided unit was 20 years, and Commission resolved ambiguity by giving effect to regulation. Federal Power Act, §§ 201-214, as amended, 16 U.S.C.A. §§ 824-824m; West's F.S.A. § 366.051; Fla.Admin. Code Ann. r. 25-17.0832(3)(e)6.

[7] Electricity 8.4

145k8.4 Most Cited Cases

Electric utility's conduct and any understanding of parties contrary to Public Service Commission's (PSC) regulations governing an electric utility's purchase of firm capacity and energy from a qualifying facility (QF) were irrelevant to Commission's enforcement of regulations and, thus, utility was not estopped by its alleged conduct from prevailing on its claims before Commission as to its obligations under its firm capacity and energy purchase contract with cogenerator which was developing qualifying facility. Federal Power Act, § § 201-214, as amended, 16 U.S.C.A. §§ 824-824m; Fla.Admin. Code Ann. r. 25-17.0832(3)(a), (3)(e)6.

[8] Public Utilities 194

317Ak194 Most Cited Cases

Supreme Court will not reweigh or reevaluate evidence presented to Public Service Commission (PSC).

***323** Arthur J. England, Jr., David L. Ross, and Joe N. Unger of Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., Miami, for Appellant.

Robert D. Vandiver, General Counsel, and Richard C. Bellak, Associate General Counsel, Florida Public Service Commission, Tallahassee; James A. McGee and Jeffrey A. Froeschle, Office of the General Counsel, Florida Power Corporation, St. Petersburg; and Alan C. Sundberg and Sylvia H. Walbolt of Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., St. Petersburg, for Appellees.

WELLS, Justice.

Panda-Kathleen, L.P./Panda Energy Company (Panda) appeals Order No. PSC-96-0671-FOF-E1 of the Florida Public Service Commission (the Commission) regarding Panda's standard-offer contract with Florida Power Corporation (FPC) to provide electricity through the process of cogeneration. We have jurisdiction. Art. V, § 3(b)(2), Fla. Const. For the reasons expressed, we find that the Commission had jurisdiction and affirm the Commission's order, holding that the Commission's jurisdiction is proper and that Order No. PSC 96- 0671-FOF-EI is affirmed.

This action was commenced at the Commission on January 25, 1995, when FPC filed a petition for declaratory statement regarding certain aspects of its standard-offer cogeneration contract with Panda. On November 25, 1991, Panda and FPC entered into the standard-offer contract at issue, which required Panda to provide and FPC to purchase 74.9 megawatts of cogenerated electricity at all times while the contract was in effect. The contract was entitled "Standard ***324** Offer Contract for the Purchase of Firm Capacity and Energy from a Qualifying Facility Less than 75 megawatts or a Solid Waste Facility." The contract incorporated the Commission's rules pertinent to cogeneration contracts, including rule 25-17.0832, Florida Administrative Code. The contract also incorporated appendices. The Commission approved the contract on October 22, 1992. *In re Fla. Power Corp.,* Docket No. 91142-EQ, Order No. PSC 92-1202-FOF-EQ (F.P.S.C. Oct. 22, 1992).

Among the rules that were incorporated were Commission rule 25- 17.0832(3)(a), which referred to "the purchase of firm capacity and energy from small qualifying facilities less than 75 megawatts," and Commission rule 25- 17.0832(3)(e)6., which stated:

> [T]he period of time over which firm capacity and energy shall be delivered from the qualifying facility to the utility [is] ... [a]t a maximum ... equal to the anticipated plant life of the avoided unit, commencing with the anticipated in-service date of the avoided unit[.]

The Commission's rules derive from section 366.051, Florida Statutes (1991), which is consistent with the cogeneration provisions of the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. §§ 824-824m (1994), and which provides that qualifying facilities (QFs) such as Panda can sell energy to utility companies at but not exceeding full avoided cost. "Avoided cost" is the cost that a utility avoids by purchasing electrical power from a QF rather than generating the electrical power itself or purchasing the power from another source. Schedule 2 to appendix C of this contract identified the economic plant life of the unit avoided by this contract as equal to twenty years.

FPC's petition before the Commission alleged that Panda proposed to construct a cogeneration facility of 115 megawatts and that, by reason of having typed within a blank space on the contract a contract expiration date of 2025, Panda was asserting the right to capacity payments for a period of time exceeding by ten years the twenty-year economic plant life of the avoided unit. The petition sought an order declaring (1) that the standard offer contract is not available if Panda configures its facility to have a capacity in excess of seventy-five megawatts, and (2) that if the Commission determines that the contract remains available to Panda, FPC has no obligation under the contract to make any payments to Panda after December 2016, the end of the twenty-year life of the avoided unit.

On February 6, 1995, Panda sought to intervene in the declaratory statement proceeding before the Commission. The Commission granted intervention on March 6, 1995. On March 14, 1995, Panda filed a motion for declaratory statement seeking an order declaring Panda's proposed 115-megawatt facility to be consistent with rule 25-17.0832(3)(a) and declaring that the contract the Commission had previously approved provided for a thirty-year time period of payments.

On June 29, 1995, Panda filed a petition for a formal evidentiary proceeding and full commission hearing. In their respective pleadings, FPC and Panda each acknowledged the Commission's jurisdiction to adjudicate those issues related to the contract, with Panda specifically asserting in its petition for evidentiary and full commission hearings that "the Commission has the right, and in these circumstances the obligation, to convene and conduct a formal evidentiary proceeding pursuant to section 120.57(1), Florida Statutes."

However, on September 12, 1995, in an apparent change of position, Panda filed a motion to dismiss and motion to stay or abate proceedings. Panda asserted that PURPA preempted the Commission's jurisdiction as to issues involving a standard-offer contract arising after the Commission's initial approval of the contract and that such issues must be decided by a court of competent jurisdiction.

By order dated December 27, 1995, the Commission denied Panda's motions. The Commission stated in its order:

> The relief FPC has requested here does not conflict with federal regulations or subject Panda to "utility-type" state rate regulation. It seeks an answer to two questions: 1) Under the provisions of Rule 25-17.0832(3)(a), Florida Administrative

Code, as applied to the standard offer at issue, is Panda permitted to build a cogeneration ***325** facility larger than 75 MW; 2) Under the provisions of Rule 25-17.0832(3)(e)(6), Florida Administrative Code, as applied to the standard offer at issue, is Florida Power obligated to make firm capacity and energy payments to Panda for more than 20 years. Certainly we have the authority to answer those questions.

In re Panda-Kathleen, L.P., Docket No. 950110-EI, Order No. PSC 95-1590- FOF-EI (F.P.S.C. Dec. 27, 1995).

An evidentiary hearing was held in February 1996. The Commission issued an order on May 20, 1996, in which it determined: (1) that Panda's proposed 115- megawatt facility does not comply with rule 25-17.0832, Florida Administrative Code; (2) that FPC is only responsible for firm capacity payments to Panda and eligible for cost recovery of those payments for twenty years in compliance with rule 25-17.0832; (3) that Panda will only be responsible for supplying firm capacity for twenty years; (4) that the contractual milestone dates are extended by a period of time equal to the time necessary for deciding matters in this docket, which was determined to be a period of eighteen months; and (5) that Panda should receive a twenty-year capacity payment stream, using the payment stream in appendix C, schedule 3, for the standard-offer contract to set a net present value of approximately $71 million in 1996, with FPC being directed to file a new capacity payment stream for administrative approval within thirty days of issuance of the Commission order. Order No. PSC-96-0671-FOF-EI.

Panda raises three issues in this appeal. First, Panda asserts that, under PURPA, federal preemption precludes the Commission's jurisdiction to determine that the contract between Panda and FPC is invalid and that any issue of contract interpretation must be left to the courts. Panda maintains that because the Commission approved the contract exactly as written, FPC cannot ask the Commission to rewrite or interpret the contract or to revoke approval of the contract. Second, Panda contends that even if the Commission has jurisdiction to hear the petitions, the Commission must conclude that the contract permitted Panda to build the facility as proposed and to receive capacity payments for thirty years, the stated duration of the contract. Third, Panda argues that FPC waived its rights and was estopped from arguing its position and prevailing because of FPC's conduct from 1991 through 1994 in proposing, entering into, and beginning performance of the contract which permitted a facility of the size that Panda proposed and which required payment for a period of thirty years. Panda does not claim that the Commission erred in respect to extending the milestone dates.

In response, the Commission and FPC contend that PURPA, by its express language, does not preempt the rules which they contend control this controversy. The appellees point to the language of PURPA found in 16 U.S.C. § 824a-3(e)(3)(A), [FN1] and also argue that the United States Supreme Court upheld a similar application of PURPA in *Federal Energy Regulatory Commission v. Mississippi,* 456 U.S. 742, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982), and, therefore, the Commission has jurisdiction. As to the second issue, the appellees argue that the Commission has the power under PURPA and decisions of this Court to enforce its own rules regarding contract duration which were part of and which governed the standard-offer contract. As to Panda's third issue, the Commission contends that the waiver and estoppel argument is fundamentally irrelevant because the operation of the standard offer contract must comply with the Commission's rules incorporated in it, any contrary understandings of the parties notwithstanding.

FN1. 16 U.S.C. § 824a-3(e)(3)(A) (1994), provides:

(e) Exemptions

....

(3) No qualifying small power production facility or qualifying cogeneration facility may be exempted under this subsection from--

(A) any State law or regulation in effect in a State pursuant to section (f) of this section....

[1] We affirm the Commission's order. As we did in *Pan American World Airways, Inc. v. Florida Public Service Commission.,* 427 So.2d 716 (Fla.1983), we begin by noting that we presume

orders of the Commission to be correct, and we only determine whether ***326** the Commission's action comports with the essential requirements of law and is supported by competent, substantial evidence. *Id.* at 717.

As to the Commission's jurisdiction to resolve this dispute concerning provisions of a standard-offer contract, we conclude that PURPA contemplates and authorizes the Commission's exercise of jurisdiction to resolve controversies such as this one. In reaching this conclusion, we rely upon the United States Supreme Court's interpretation of state regulatory jurisdiction under PURPA in *Federal Energy Regulatory Commission v. Mississippi,* which states:

> Section 210 of PURPA's Title II, 92 Stat. 3144, 16 U.S.C. § 824a-3, seeks to encourage the development of cogeneration and small power production facilities. Congress believed that increased use of these sources of energy would reduce the demand for traditional fossil fuels.
>
> But it also felt that two problems impeded the development of nontraditional generating facilities: (1) traditional electricity utilities were reluctant to purchase power from, and to sell power to, the nontraditional facilities, and (2) the regulation of these alternative energy sources by state and federal utility authorities imposed financial burdens upon the nontraditional facilities and thus discouraged their development.
>
> In order to overcome the first of these perceived problems, § 210(a) directs FERC, in consultation with state regulatory authorities, to promulgate "such rules as it determines necessary to encourage cogeneration and small power production," including rules requiring utilities to offer to sell electricity to, and purchase electricity from, qualifying cogeneration and small power production facilities. Section 210(f), 16 U.S.C. § 824a-3(f), requires each state regulatory authority and nonregulated utility to implement FERC's rules. And § 210(h), 16 U.S.C. § 824a-3(h), authorizes FERC to enforce this requirement in federal court against any state authority or nonregulated utility; if FERC fails to act after request, any qualifying utility may bring suit.
>
> To solve the second problem perceived by Congress, § 210(e), 16 U.S.C. § 824a-3(e), directs FERC to prescribe rules exempting the favored cogeneration and small power facilities from certain state and federal laws governing electricity utilities.
>
> Pursuant to this statutory authorization, FERC has adopted regulations relating to purchases and sales of electricity to and from cogeneration and small power facilities. *These afford state regulatory authorities and nonregulated utilities latitude in determining the manner in which the regulations are to be implemented. Thus, a state commission may comply with the statutory requirements by issuing regulations, by resolving disputes on a case-by-case basis, or by taking any other action reasonably designed to give effect to FERC's rules.*

456 U.S. at 750-51, 102 S.Ct. at 2132-33 (footnotes omitted) (citations omitted) (emphasis added).

In Florida, PURPA is implemented by consistent state policy authorized by section 366.051, Florida Statutes (1991). In *Florida Power & Light Co. v. Beard,* 626 So.2d 660 (Fla.1993), we recognized that section 366.051 vested the Commission with authority to review standard offer contracts "to ensure that they are fair to the parties to the contract and that they further the energy policies of the State as defined by the Legislature." *Id.* at 663. One of the energy policies defined by the legislature is the encouragement of cogeneration and small power production by directing that utilities "shall purchase, in accordance with applicable law, all electricity offered for sale by such cogenerator." § 366.051, Fla. Stat. (1991). The legislature further provided that "[t]he commission shall establish guidelines relating to the purchase of power or energy by public utilities from cogenerators or small power producers." § 366.051, Fla. Stat. (1991).

[2] In accord with this legislative directive, the Commission adopted relevant portions of FERC's PURPA rules, and it further promulgated rules 25-17.080 through 25-17.091, Florida Administrative Code. These rules are incorporated in this standard-***327** offer contract. Specifically, rule 25-17.0832(3)(a) requires participating QFs to have less than 75-megawatt capacity and establishes that the period of time for delivery be equal to the anticipated plant life of the avoided unit. We believe it would be contrary to both federal and state statutory authority directing the cogeneration

program to deny the Commission the power to construe the regulations it has adopted in furtherance of that program and to resolve conflicts concerning implementation of those regulations. Our conclusion naturally flows from the United States Supreme Court's additional statement in *Federal Energy Regulatory Commission v. Mississippi:*

> In essence, then, the statute and the implementing regulations simply require [state] authorities to adjudicate disputes arising under the statute. Dispute resolution of this kind is the very type of activity customarily engaged in by the Mississippi Public Service Commission.

Id. at 760, 102 S.Ct. at 2137.

This is likewise the type of activity in which the Florida Public Service Commission is engaged. Furthermore, we agree with the Commission that to forbid the Commission to resolve disputes concerning its rules pertaining to cogeneration would render the Commission powerless to limit standard-offer contracts to small QFs with capacity of less than seventy-five megawatts or to fulfill its obligation under both federal and state statutes to limit capacity payments to avoided costs. Both of the federal and state legislative enactments as well as the judicial decisions applying the statutes clearly contemplate that the Commission shall bear the responsibility of resolving such disputes.

[3] We find *Freehold Cogeneration Associates, L.P. v. Board of Regulatory Commissioners,* 44 F.3d 1178 (3d Cir.1995), the case upon which Panda primarily relies in arguing against Commission jurisdiction, to be factually distinguishable. In *Freehold,* the board was not construing and implementing its own regulations. Rather, that case involved utility-type regulation in the form of efforts of the New Jersey regulatory commission to induce a cogenerator to renegotiate a reduction in the amount of capacity payments to save money for ratepayers. *Id.* at 1183. The Court held that Freehold's pleading sufficiently alleged utility-type rate regulatory action by the state regulatory commission in conflict with PURPA's exemption of QFs from state law regulating rates of electric utilities. *Id.* at 1190. The court concluded that once the commission approved the power purchase agreement on the ground that the rates were consistent with avoided costs, any action or order by the commission to reconsider its approval or to deny the passage of those rates to the utilities consumers was preempted by federal law. *Id.* at 1194. We recognize, as did the court in *Freehold,* that utility-type rate regulation is clearly preempted. However, the Florida Commission, in its order ruling upon Panda's standard-offer contract, did not engage in utility-type rate regulation. This case involves the construction of conflicting provisions that were included in the contract from the its inception, not a modification in the terms of the contract so as to adjust rates paid by consumers.

[4][5] Moving to Panda's second issue, we find that the regulations and the contract specify a contract for a facility with a capacity less than seventy-five megawatts. The Commission has interpreted the 75- megawatt threshold as applying to the "total net capacity" of a QF rather than the "committed capacity" sold by a QF pursuant to a standard offer contract. *In re Petition of Polk Power Partners, L.P. Ltd.,* Docket No. 920556-EQ, Order No. PSC 92-0683-DS-EQ (F.P.S.C. July 21, 1992). [FN2] We give great deference to the Commission's interpretation of its own rules and will not disturb that interpretation unless the interpretation is shown to be clearly erroneous. *Pan American World Airways, Inc.,* 427 So.2d at 719. Applying the Commission's construction of its rule, we conclude that there is competent, substantial evidence to support the Commission's finding that Panda does not need a ***328** 115-megawatt facility to serve its standard offer contract and that, therefore, Panda's proposed QF does not comply with rule 25-17.0832, Florida Administrative Code, which is incorporated into the contract.

> FN2. Panda argues that the Commission should not apply its *Polk Power* definition retroactively. However, the Commission points out that its *Polk Power* order is dated July 21, 1992, and the Panda standard-offer contract is dated October 22, 1992.

[6] We next consider the Commission's order that the duration of capacity payments to Panda be limited to twenty years. This issue brings into focus the issue of which provision of a standard-offer contract controls when a typed-in provision directly conflicts with the Commission's

rules and the appendices which are incorporated into the contract. In this case, Panda typed in a termination date of March 2025, thirty years from the early in-service date that Panda originally requested. As earlier noted, rule 25- 17.0832(3)(e) 6., Florida Administrative Code, establishes that, under the contract, electrical power equal to firm capacity of the QF shall be delivered for a period of time equal to the anticipated plant life of the utility's avoided power-production unit. Appendix C, schedule 2, shows that the economic plant life of FPC's avoided unit is twenty years. The problem presented here is that the Commission approved the contract with the apparently conflicting provisions of thirty-year and twenty-year terms. The Commission resolved this conflict by determining that its rule controlled. The Commission rejected an interpretation of the contract offered by FPC's expert that the contract term is thirty years, but since the economic life of the avoided unit is only twenty years, the contract only requires FPC to purchase as-available energy starting in year twenty-one. Rather, the Commission determined that it was required by PURPA and its own rules to ensure that utilities pay no more than the cost avoided by purchasing power from the QF and that the Commission would resolve the ambiguity created by the conflict between the typed-in provision, the rule, and the appendices, by giving effect to the rule. Thus, the Commission held that FPC is only required to make capacity payments for twenty years in accordance with the rule and that Panda is only responsible for supplying firm capacity for twenty years.

We find that the Commission's decision did not deviate from the essential requirements of law and that the decision conformed to the intent of PURPA and the Commission's rules. Moreover, we conclude that if the Commission had not resolved the conflict created by the Commission's approval of a contract term conflicting with the Commission's rule as to avoided cost, then the contract would have violated PURPA and section 366.051, Florida Statutes (1991). In sum, the Commission had the power to and did correct its own mistake regarding contract duration. [FN3]

> FN3. Construction of the Panda QF had not begun when the Commission's correcting order of May 20, 1996, was entered.

[7][8] Finally, as to Panda's third issue contending that FPC's conduct from 1991 through 1994 created an estoppel, we agree with the Commission that FPC's conduct and any understandings of the parties contrary to the Commission's rules are irrelevant to the Commission's enforcement of its rules. Our determination rests on whether the Commission's construction of its rules departed from the essential requirements of law and whether its decision was based on competent, substantial evidence. We will not reweigh or reevaluate the evidence presented to the Commission. *McCaw Communications of Florida, Inc. v. Clark,* 679 So.2d 1177, 1178 (Fla.1996).

For the reasons stated, we affirm the order of the Commission.

It is so ordered.

KOGAN, C.J., and OVERTON, GRIMES, HARDING and ANSTEAD, JJ., concur.

SHAW, J., dissents.

701 So.2d 322, 22 Fla. L. Weekly S571

Briefs and Other Related Documents (Back to top)

• 1996 WL 33416760 (Appellate Brief) Reply Brief on the Merits of Panda-Kathleen, L.P. (Dec. 10, 1996)

• 1996 WL 33416759 (Appellate Brief) Answer Brief of Appellee Florida Public Service Commission (Nov. 04, 1996)

• 1988 WL 1044920 (Appellate Brief) Appellee Florida Power Corporation's Answer Brief on the Merits (1988)

END OF DOCUMENT

Westlaw.

43 CPUC 2d 137
43 CPUC 2d 137, 1992 WL 406687 (Cal.P.U.C.)
(Publication page references are not available for this document.)

H

Ultrapower-Rocklin
v.
Pacific Gas and Electric Company
Decision 92-01-024
Case 91-04-013
California Public Utilities Commission
January 10, 1992

COMPLAINT by biomass-fired qualifying cogeneration facility (QF) that an electric utility's payments for purchased power should be based on firm capacity prices in effect as of the time the QF demonstrated its firm capacity availability, even though that occurred more than seven months after initial deliveries of energy and beyond the five-year limit in the power purchase contract; denied. Commission finds no logical reason for the delay in demonstration, and therefore holds the QF to payments of $184 per kilowatt per year, rather than its requested $196 per kilowatt per year.

[ABSTRACT OF DECISION. THE FULL CASE TEXT IS OMITTED.]

P.U.R. Headnote and Classification

1.

COGENERATION

s35 -- Rates -- Factors -- Firm capacity availability -- Timing of demonstration.

Ca.P.U.C. 1992

The price to be paid for purchases of firm capacity from a qualifying facility (QF) is dependent upon the date the QF demonstrates and delivers firm capacity availability, as opposed to initial delivery of energy, unless that demonstration occurs outside the limits of the power purchase contract, in which case the date of initial delivery is controlling, as long as such initial delivery occurred within the prescribed contract period.

Ultrapower-Rocklin v Pacific Gas and Electric Company

P.U.R. Headnote and Classification

2.

COGENERATION

s35 -- Rates -- Factors -- Firm capacity availability -- Timing of demonstration.

Ca.P.U.C. 1992

Where a biomass-fired qualifying facility (QF) did not demonstrate firm capacity availability until more than seven months after initial deliveries of energy and three months beyond the five-year limit in the subject power purchase contract, the QF was found to be entitled to firm capacity payments in effect as of the date of initial deliveries rather than as of the date it demonstrated firm capacity availability, since the QF presented no reasonable excuse for its late demonstration.

Ultrapower-Rocklin v Pacific Gas and Electric Company

Before Fessler, president, and Ohanian, Eckert, and Shumway, commissioners.

BY THE COMMISSION:

OPINION

I. Summary

The complaint of Ultrapower-Rocklin (Ultrapower), a biomass-fired Qualifying Facility (QF), against Pacific Gas and Electric Company (PG&E) for the utility's alleged failure to pay Ultrapower the correct capacity price for electricity is denied. PG&E shall pay Ultrapower for capacity delivered under the terms of the parties' contract at the rate of $184 per kilowatt/year (kW/yr.).

II. Procedural History

Ultrapower filed its "Complaint for Expedited Relief" on April 11, 1991. Ultrapower sought an order declaring that its power purchase agreement (PPA) with PG&E entitled it to a firm capacity price of $196 kW/yr., based upon its firm capacity availability date of March 16, 1990. Ultrapower stated that no facts were in dispute and that the proceeding may be decided by the Commission without evidentiary hearings.

On May 16, 1991, the "Answer of Defendant PG&E to Complaint for Expedited Relief" was filed. PG&E requested dismissal of the complaint and confirmation that QFs are not entitled to firm capacity prices higher than those corresponding to the fifth year following execution of the PPA.

On June 6, 1991, the "Joint Motion of Ultrapower and PG&E for Establishment of Briefing Schedule" was filed. On June 12, 1991, the assigned administrative law judge granted the motion and found that the parties had waived evidentiary hearing. The Commission's Division of Ratepayer Advocates (DRA) was included as a party for briefing purposes. Accordingly, this matter has been decided on the basis of the parties' concurrent opening and closing briefs.

III. Facts

The parties' pleadings recite the following facts.

Ultrapower and PG&E entered into a PPA on December 12, 1984. The PPA was an interim standard offer 4 (ISO 4) contract with a 30-year term. Under the terms of the PPA, Ultrapower elected to sell 22,000 kW of firm capacity to PG&E. The electricity was to be generated by a wood-fired qualifying facility located in Rocklin, California (Project).

Article 12 of the PPA provides for termination of the agreement "if energy deliveries do not start within five years of the execution date." Ultrapower made its first deliveries of energy to PG&E on June 9, 1989, six months before its deadline of December 12, 1989.

In order to commence the 30-year term of the contract and to establish a firm capacity price, the PPA requires the Project to demonstrate to PG&E's satisfaction that its features and equipment are capable of operating simultaneously to deliver firm capacity continuously into PG&E's system.

On January 15, 1990, at PG&E's request, Ultrapower informed PG&E that the facility would begin demonstrating firm capacity on January 29, 1990. On February 2, 1990, the firm capacity test was interrupted because of poor plant performance caused by the inoperability of the plant fuel feed system. On February 25, 1990, Ultrapower notified PG&E that it would resume testing. Firm capacity of 22,000 kW was demonstrated on March 16, 1990.

March 16, 1990 was established as the Firm Capacity Availability Date (FCAD) for the Project. Accordingly, PG&E provided billing statements to the Project for April and May of 1990 that used a price for firm capacity equal to $196 kW/yr. This is the Commission-authorized price for firm capacity delivered by a QF that establishes an FCAD in the year 1990 under a 30-year ISO 4 contract.

In June of 1990, PG&E informed Ultrapower that it was reducing the firm capacity price to $184 kW/yr., retroactive to the previous payments. $184 kW/yr. is the authorized price for firm capacity that is made available in 1989. PG&E advised Ultrapower that the previous payments were due to an inadvertent administrative error; PG&E's maximum payment is based on the firm capacity price for the fifth year following the execution of the PPA, regardless of the actual FCAD.

Ultrapower believes it is entitled to firm capacity payments at the rate of $196 kW/yr. and has attempted to resolve this dispute with PG&E. PG&E denies Ultrapower's claim and relies on its February 10, 1989 letter to Ultrapower's president. In that letter, PG&E maintained, "If testing occurs in the sixth year and a QF establishes its FCAD on a date which is past its five-year deadline, it will not receive the subsequent year's price. In this case, the year of five-year deadline will determine the price." PG&E argues that regardless of whether Ultrapower demonstrated firm capacity within the calendar year of its five-year deadline (1989) or when it actually did (1990), Ultrapower would be entitled only to the capacity price for 1989 from Table E-2 [FN1] of ISO 4.

IV. Discussion

A. Governing Principles

The implementation of standard offers to QFs has raised questions of contract interpretation such as this one. The Commission applies the principles of contract law in its review of utility purchases from QFs (see, e.g., Colmac Energy, Inc. v. Southern California Edison Company (1989) 31 CPUC 2d 549 (applying principles of promissory estoppel).

Our first reference point is the language of the PPA itself, since it constitutes the parties' outward manifestation or expression of assent. Commission precedent will guide our review of the contract terms.

Ultrapower argues that Commission denial of firm capacity payments at the rate authorized for the year of the FCAD would constitute a modification of its PPA. We encountered a similar argument from PG&E when it opposed the escalation of the firm capacity prices in Table E-2. In that proceeding, as here, we are not retroactively reforming ISO 4 but simply construing express contract terms to give them their clear and logical effect. (PG&E (1986) 22 CPUC 2d 105, 110.) Moreover, Ultrapower's argument overlooks the fact that the ISO 4 which it signed lacks a firm capacity price for the years 1988, 1989, and 1990. Ultrapower relies on the Commission's decision that escalated those prices for its firm capacity payments. Here, we are interpreting the FCAD in light of the entire contract, much as we amended the firm capacity price table in view of the entire standard offer.

B. Interpretation of Ultrapower's Contract

The controversy is whether Ultrapower should receive the firm capacity price authorized for 1989 ($184 kW/yr.) or 1990 ($196 kW/yr.). The PPA provides the following relevant definitions:

Firm capacity - That capacity, if any, identified as firm in Article 5 except as otherwise changed as provided herein.

Firm capacity availability date - The day following the day during which all features and equipment of the Facility are demonstrated to PG&E's satisfaction to be capable of operating simultaneously to deliver firm capacity continuously into PG&E's system as provided in this Agreement.

Firm Capacity Price - The price for firm capacity applicable for the firm capacity availability date and the number of years of firm capacity delivery from the firm capacity price schedule, Table E-2, Appendix E.

Firm capacity price schedule - The periodically published schedule of the $/kW-year prices that PG&E offers to pay for firm capacity. (See Table E-2, Appendix E.)

We have previously determined that the date a QF delivers firm capacity, and not the date of its initial energy delivery, determines the firm capacity price in accordance with Table E-2 PG&E (1986) 23 CPUC 2d 1, 2. The parties agree that since no time is specified in the PPA as the FCAD, a QF may demonstrate firm capacity at any time so long as it comes on-line within five years of contract execution.

However, the parties differ as to the year in which an FCAD can be attributed under the contract. Ultrapower maintains that a QF may obtain a higher firm capacity price than the one authorized for the year in which it came on line by establishing an FCAD in the next calendar year. PG&E claims that the FCAD should be attributed to the year in which the QF is required to commence energy deliveries, or in other words, within five years of contract execution.

We interpret the contract's lack of FCAD deadline as an acknowledgment that the QF's incentive to earn firm capacity payments, which are greater than the otherwise applicable "as available" capacity payments, is sufficient to assure that it will demonstrate firm capacity within a reasonable time. If the contract does not specify the time of performance, and the act cannot be done "instantly," a reasonable time is allowed. (Witkin, Summary of California Law, Vol. 1 Contracts, Section 708.)

PG&E asserts that any delay in establishing an FCAD would entitle Ultrapower to a windfall through the receipt of higher firm capacity prices than it would have received had it proceeded promptly and diligently to demonstrate firm capacity following commencement of energy deliveries. Since Ultrapower began its energy deliveries on June 9, 1989, PG&E implies that Ultrapower could have demonstrated firm capacity within the remaining six months of 1989. However, Ultrapower did not do so. The issue is, under the circumstances of this case, whether Ultrapower demonstrated firm capacity within a reasonable period of time.

C. The Decision Extending PG&E's Capacity Payment Table

As noted above, the ISO 4 signed by Ultrapower did not include a firm capacity price for 1989, the fifth year after the date of contract. The Commission extended PG&E's firm capacity price schedule "to include those years in which the QF projects, consistent with the terms of the respective contracts, may come on line." [FN2] The Commission intended to provide firm capacity prices for QFs who were entitled to commence operations in years that were not listed on Table E-2. However, the express terms of the ISO 4 contract provide that a QF is entitled to a firm capacity price authorized for the year in which it demonstrates firm capacity, not in the year it begins deliveries.

We agree with PG&E that the price certainty accorded QFs by virtue of the capacity and energy price tables in interim ISO 4 contemplated a five-year planning horizon, not a six-year horizon. This is borne out by the extension of Table E-2 to cover five years from the date of contract. In Colmac, supra, we explained that capacity prices were provided for firm operation beginning in years contemplated at the time the contract was executed. We have concluded that even the legitimate operation of the force majeure clause would not entitle a QF to a firm capacity price greater than the one authorized for the fifth year following contract execution. (Decision (D.) 88-08-054, mimeo. p. 3, fn. 1.)

We adopt the premise that a QF's right to firm capacity price can be no greater than that of a QF which has demonstrated firm capacity within a reasonable time. A QF whose FCAD was delayed by the occurrence of a force majeure would have demonstrated firm capacity within a reasonable time, yet it would not be entitled to a higher price. Thus, the fact that the PPA does not specify a deadline for the establishment of an FCAD cannot be construed as granting a QF the affirmative right to a higher capacity price due to delayed demonstration of firm capacity.

Ultrapower maintains that no FCAD deadline was contemplated at the time it executed its contract, and no deadline may be imputed retroactively. It argues that a prior Commission decision supports its establishment of FCAD in April of 1990.

Ultrapower relies on D.86-12-013 to justify its claim to the 1990 firm capacity price. In that decision, Commission reasoned that since ISO 4 was suspended in April 1985, and QFs are required to begin power deliveries within five years of contract signing, all interim ISO 4 QFs will have had to begin power deliveries by April 1990. The Commission assumed that QFs would establish their FCAD in 1990. [FN3] No firm capacity prices were authorized for years after 1990 because there was no need for them.

It is important to note that D.86-12-013 did not find that eight months from the date of initial delivery was the reasonable time for establishing firm capacity as a matter of law. We considered eight months to be the maximum likely period of time needed by a QF to refine its operations as needed to demonstrate firm capacity to PG&E.

D. Imputation of Firm Capacity Availability Date

Ultrapower is required by its ISO 4 contract to establish firm capacity within a reasonable time of its commencement of energy deliveries. Those deliveries began on June 9, 1989.

Ultrapower began its firm capacity demonstration, upon PG&E's request, on January 29, 1990 and completed the test on March 16, 1990. The test took 46 days. This testing period was well within the eight-month maximum period contemplated by the Commission in D.86-12-013. The completion of the last occurred more than nine months after the commencement of energy deliveries the previous June.

Had Ultrapower commenced its firm capacity demonstration date as late as five months after its date of initial energy deliveries, or November 9, 1989, and established firm capacity within the same period as actually required, or 46 days, Ultrapower would have established firm capacity within the same calendar year as the date of initial deliveries. However, commencement of the demonstration was postponed for more than seven months.

The reason for delay is not stated. In fact, Ultrapower's complaint states that the Project scheduled its firm capacity demonstration at PG&E's request. As the complainant, Ultrapower has the burden of showing the reasonableness of its actions. It has not alleged facts to show that the delay in establishing an FCAD was reasonable.

In the absence of facts to show that the FCAD was attained in a reasonable manner, we must rely on the facts before us. The Project demonstrated firm capacity after a 46-day test period. This "shakedown and testing period after initial turbine roll" included a delay caused by a faulty feedstock mechanism. In this case, for the limited purpose of establishing a firm capacity price, it is reasonable to impute an FCAD 46 days after the date of initial energy deliveries. That date would occur in 1989, within five years after contract execution. This result is consistent with the intent the Commission expressed when it extended the capacity price tables: "QFs are not inherently entitled to an indefinite capacity price extension, especially when the offer's availability had been suspended more than five years previously."

V. Conclusion

We conclude that PG&E should pay Ultrapower the firm capacity price authorized for QFs under ISO 4 contract for 30 years that demonstrated firm capacity in 1989, or $184 kW/yr. Ultrapower's complaint is denied.

Findings of Fact

1. On December 12, 1984, Ultrapower and PG&E entered into an ISO 4 contract.

2. Article 12 of the ISO 4 contract provides for termination of the agreement if the seller does not commence energy deliveries within five years of the execution date.

3. Ultrapower made its first deliveries of energy to PG&E on June 9, 1989.

4. In order to commence the 30-year term of the contract and to establish a firm capacity price, the ISO 4 contract requires the seller to demonstrate to PG&E's satisfaction that it can deliver firm capacity continuously into PG&E's system.

5. On January 15, 1990, at PG&E's request, Ultrapower informed PG&E that it would begin demonstrating firm capacity on January 29, 1990.

6. Ultrapower demonstrated firm capacity on March 16, 1990, 46 days after the commencement of the test.

7. March 16, 1990 is the Firm Capacity Availability Date (FCAD) for the purposes of ISO 4.

8. Ultrapower's demonstration of firm capacity did not begin until more than seven months after its date of initial energy deliveries.

9. Had Ultrapower commenced its firm capacity demonstration date as late as five months after its date of initial energy deliveries, or November 9, 1989, and established firm capacity within the same period as actually required, or 46 days, Ultrapower would have established firm capacity within the same calendar year as the date of initial deliveries.

10. Ultrapower did not give any reason for delaying its demonstration of firm capacity.

11. In the absence of facts to show that Ultrapower's the firm capacity availability date was delayed in a reasonable manner, we may reasonably impute a firm capacity availability date in the same year as the date of initial energy deliveries, or 1989.

12. PG&E is authorized to pay $184 kW/yr. for firm capacity delivered for 30 years beginning in 1989 under its ISO 4 contract.

13. PG&E is authorized to pay $196 kW/yr. for firm capacity delivered beginning in 1990 for 30 years under its ISO 4 contract.

14. In this case, the imputation of a firm capacity availability date in 1989 will require PG&E to pay Ultrapower $184 kW/yr. for firm capacity delivered under the parties' power purchase agreement.

15. This order should be effective immediately to provide price certainty to the seller.

Conclusions of Law

1. ISO 4 does not require the payment of a firm capacity price based on the actual firm capacity availability date if there is an unreasonable delay between the time of initial energy deliveries and the commencement of the demonstration of firm capacity.

2. Where no deadline for performance is given in a written contract, the law implies that performance will occur within a reasonable time.

3. In the absence of any allegation of the reason for the delay, a seven-month delay between the commencement of energy deliveries and the commencement of the QF's demonstration of firm capacity is not reasonable.

4. The utility purchaser's firm capacity payment obligation under a standard offer contract is limited to payment based on the QF seller's demonstration of firm capacity within a reasonable time.

5. Since the QF did not demonstrate firm capacity within a reasonable time, the Commission may impute a date by which, given the facts of the case, the QF would have demonstrated firm capacity had it acted reasonably.

6. It is reasonable to order PG&E to pay Ultrapower the firm capacity price applicable to deliveries beginning in 1989, or $184 per kW/yr., for firm capacity delivered under the parties' power purchase agreement.

ORDER

IT IS ORDERED that:

1. The April 11, 1991 complaint of Ultrapower-Rocklin (Ultrapower) against Pacific Gas and Electric Company (PG&E) for the utility's alleged failure to pay Ultrapower the correct capacity price for electricity is denied.

2. PG&E shall pay Ultrapower for capacity delivered under the terms of the parties' contract at the rate of $184 per kilowatt/year, retroactive to March 16, 1990.

This order is effective today.

Dated January 10, 1992, at San Francisco, California.

FOOTNOTES

FN1 Table E-2 lists the Commission-approved forecast of firm capacity values for QFs commencing firm capacity deliveries in 1982-1987.

FN2 "The extension of Table E-2 applies to firm capacity QFs whose interim Standard Offer 4 contracts specify an on-line date in 1988, 1989, or 1990." (PG&E (1986) 22 CPUC 2d 105, 111.)

FN3 "We think it reasonable in this context to expect that most QFs in such a situation could achieve firm capacity within eight months, i.e. by the end of 1990. (We note that Basic . . . asserts that the 'shakedown and testing period,' starting from initial turbine roll, 'is typically between 45 and 90 days in duration.') In any event, such QFs are not inherently entitled to an indefinite capacity price extension, especially when the offer's availability had been suspended more than five years previously." (PG&E, supra, 23 CPUC 2d at 2, fn. 2, emphasis in original.)

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C

In the Matter of Indeck-Yerkes Energy Services, Inc., Respondent,
v.
Public Service Commission of the State of New York et al., Appellants.

Supreme Court, Appellate Division, Third Department, New York

January 24, 1991

SUMMARY

Appeals from (1) a judgment of the Supreme Court (George L. Cobb, J.), entered January 3, 1990 in Albany County in a proceeding pursuant to CPLR article 78, which granted a petition to annul a determination of respondent Public Service Commission denying a request by petitioner to compel respondent Niagara Mohawk Power Corporation to purchase all of the average annual net output of electricity generated by petitioner's facility, and (2) an order of said court, entered August 24, 1990 in Albany County, which granted a motion by respondents for reargument, and, upon reargument, adhered to its prior determination.

HEADNOTES

Public Utilities--Rate Making--Purchase of Power from Cogeneration Facility-- Purchase of Additional Power at Contractually Negotiated Rate

(1) A determination of the Public Service Commission (PSC) that respondent public utility was not obligated to purchase at a contractually negotiated rate the additional electricity produced by petitioner's cogeneration facility is confirmed where improvements to the facility have increased its generating capability by some 9% over the output anticipated when the contractual pricing structure was initially agreed to and approved by the PSC, since the size of the facility and its level of output were a significant factor and material consideration in the PSC's approval of the agreement. There was a rational basis for the determination: although petitioner could expect that respondent utility would purchase any additional electricity its facility generated, that expectation is not determinative of the price at which such additional output would be purchased. Petitioner did not expressly reserve the right to expand output under the agreement, and the PSC's concern over the pricing structure of the agreement as perhaps being unduly favorable to petitioner and burdensome to the utility's ratepayers was only allayed after computations were made based upon the initial anticipated output of the facility.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Electricity, Gas, and Steam, §§ 10-12; Public Utilities, §§ 43, 240, 244.

NY Jur 2d, Energy, §159. ***619**

ANNOTATION REFERENCES

See Index to Annotations under Electricity and Electric Companies; Public Service Commissions; Utilities.

APPEARANCES OF COUNSEL

William J. Cowan (James W. Brew of counsel), for Public Service Commission of the State of New York, appellant.

Le Boeuf, Lamb, Leiby & MacRae (Cathleen A. McNulty, Jeffrey W. Meyers and *H. Peter Young* of counsel), for Niagara Mohawk Power Corporation, appellant.

Saperston & Day, P. C. (Daniel M. Darragh of counsel), for respondent.

OPINION OF THE COURT

Levine, J.

Petitioner owns and operates a cogeneration facility (hereinafter the facility) in the Town of Tonawanda, Erie County, that is qualified under the Federal Public Utility Regulatory Policies Act (16 USC § 824a-3) (hereinafter PURPA) and Public Service Law § 66-c for the mandatory purchase of its electric energy production by public utilities. PURPA provides that such purchases shall be paid for at rates that are, *inter alia,* "just and reasonable to the electric consumers of the electric utility" (16 USC § 824a-3 [b] [1]), but may not exceed the purchasing utility's avoided cost, i.e., the cost the utility avoids paying by not producing the energy itself *(see,* 16 USC § 824a-3 [d]; *Matter of Consolidated Edison Co. v Public Serv. Commn.,* 63 NY2d 424, 431, *appeal dismissed* 470 US 1075). Under Public Service Law § 66-c, respondent Public Service Commission (hereinafter the PSC) is directed to fix the terms and conditions of such purchases it finds are "just and economically reasonable to the [utility's] ratepayers, non-discriminatory ... and further the public policy" of encouraging the development of alternate energy production facilities, etc., with the added requirement of a minimum purchase price of 6 cents per kilowatt hour (Public Service Law § 66-c [1]). Thus, the PSC performs the regulatory role under the statutory framework of approving the terms and conditions of energy purchase agreements between public utilities and qualifying alternate energy production facilities, cogeneration facilities and small hydro-facilities *(**620see, Matter of Long Lake Energy Corp. v Public Serv. Commn.,* 148 AD2d 84, 88, *lv denied* 75 NY2d 701), and none of the parties to these appeals dispute this.

In February 1987, petitioner entered into a 30-year contract with respondent Niagara Mohawk Power Corporation (hereinafter NiMo) for the purchase of electric production from petitioner's facility. The agreement recited that petitioner was to operate a plant with an "initial capacity of approximately 49 megawatts, and with expected annual production of approximately 400,000 megawatt-hours initially, (individually and together referred to as 'ELECTRICITY')". The agreement obligated NiMo to purchase "all of the ELECTRICITY" produced at petitioner's facility.

The contract between NiMo and petitioner contained a "cone-like" pricing structure that included a floor and a ceiling, as has been particularly described in *Matter of Long Is. Light. Co. v Public Serv. Commn.* (137 AD2d 205, 209, *lv denied* 73 NY2d 703). The pricing structure in the agreement was "front-loaded" for the first 15 years of its term, i.e., the payments were likely to exceed estimated avoided costs. In that sense, during the first half of the life of the contract, NiMo's ratepayers would be subsidizing the construction and operation of petitioner's facility, since NiMo's cost of buying energy from petitioner was passed on in its rates to customers, and that cost exceeded what NiMo's expenses would have been in otherwise producing the same energy *(see, Matter of Long Lake Energy Corp. v Public Serv. Commn., supra,* at 90; *Matter of Long Is. Light. Co. v Public Serv. Commn., supra,* at 209).

The agreement was submitted to the PSC staff, which issued a report qualifiedly recommending approval. The PSC approved the agreement at its meeting of June 10, 1987. In April 1988, petitioner informed NiMo that "due to improvement in cycle efficiency and overall system availability", the anticipated output of its facility would be 53.38 megawatts (hereinafter MW) rather than 49 MW and that it considered NiMo bound to purchase the increased amount pursuant to the pricing terms of the agreement. When NiMo disagreed, petitioner applied to the PSC for a declaratory ruling as to whether NiMo was required to accept the additional output priced according to the pricing structure of the agreement.

The PSC issued its declaratory ruling effective September 14, 1988 in which it determined that (1) representations of the ***621** size of the facility were "a significant factor in evaluating the reasonableness" of the contract submitted to it for approval, (2) the increase of 4.38 MW, some 9% of the original total estimated output, was a material deviation from the estimate in the approved agreement, (3) the use of the word "approximately" in conjunction with the capacity of 49 MW only referred to "an inescapable imprecision with respect to the expected output of a planned facility", and not to an increase which is attributable, as here, to changes in the facility's operations "to improve cycle efficiency and availability", and (4) petitioner failed to expressly reserve the increased capacity in the agreement. Therefore, the PSC ruled that its approval of the terms of the agreement did not cover the increased capacity, and the sale of the additional output to NiMo required renegotiation and pricing in conformity with the PSC's more recently adopted "Interim Policy", which was less favorable to facility developers *(see, Matter of Long Lake Energy Corp. v Public Serv. Commn., supra).* Petitioner's application for a rehearing was denied, with the PSC reiterating that the specified capacity of approximately 49 MW was a "material consideration" in the PSC's approval of the agreement and of its "unusual pricing provisions".

Petitioner then brought the instant CPLR article 78 proceeding for judicial review of the PSC's declaratory ruling. Supreme Court annulled. The court interpreted the contract as essentially requiring NiMo to accept and pay for the entire output of petitioner's facility. It also found, based notably upon other terms of the agreement and portions of the PSC's staff report, that NiMo and the PSC were aware of the possibility that petitioner's facility would be expanded well beyond the estimated initial capacity of 49 MW. Therefore, the court held that the PSC acted arbitrarily in refusing to include the increase within NiMo's obligations under the agreement. The PSC and NiMo appeal from Supreme Court's annulment of the declaratory ruling.

We reverse. The issue in this proceeding is not one of pure interpretation of the language of the agreement between petitioner and NiMo by application of common-law principles of contract. Rather, it is whether there was a rational basis to the PSC's determination of the scope of its prior approval of the parties' agreement, particularly the price structure contained therein, as not covering other than insignificant deviations from the contract's stated initial output of approximately 49 MW *(*622see, Matter of New York State Cable Tel. Assn. v New York State Pub. Serv. Commn.,* 125 AD2d 3, 6). Moreover, we disagree with Supreme Court as to the significance of any understanding by NiMo and the PSC that petitioner's facility might expand its output substantially beyond the initial capacity set forth in the agreement. As the PSC recognized in its declaratory ruling, petitioner, the operator of a qualified facility under PURPA and Public Service Law § 66-c, could expect that NiMo would be required to purchase the output of any expanded capacity at the facility. However, this is not determinative of whether the purchase of any additional output should be governed by the pricing structure set forth in the agreement.

In our view, the reasonableness of the PSC's determination is amply demonstrated by the record. First, as the PSC pointed out, petitioner did not expressly reserve the right to expand output under the terms and conditions of the agreement and, indeed, a clause to that effect was struck from the agreement by the parties before its submission for PSC approval. In contrast, express terms for expanding capacity were included in other NiMo contracts with similar facilities submitted to the PSC. Moreover, under the express language of the agreement, NiMo obligated itself to accept the facility's output of "ELECTRICITY" subject to the terms and conditions in the agreement. "ELECTRICITY", however, was defined under the agreement as an initial capacity of about 49 MW and annual production of 400,000 MW-hours. Thus, the terms of the agreement would not have necessarily alerted the PSC to the existence, if any, of an agreement between the parties that substantially expanded output would be purchased in accordance with the terms of the agreement's cone-pricing structure.

Most importantly, both the PSC's staff report and the minutes of the PSC's June 10, 1987 meeting at which the agreement was approved (both of which petitioner attached to its petition) reflect a concern over the pricing structure of the agreement as perhaps being unduly favorable to petitioner and burdensome to ratepayers. The misgivings of the PSC's staff were only allayed after the staff quantified the potential benefits and burdens by estimates of specific dollar amounts under the terms of the agreement. Petitioner has not contested the PSC's assertion that these staff estimates were *necessarily* based upon the represented 49 MW capacity of petitioner's facility. Thus, the PSC was entirely accurate in stating in the declaratory ruling and its denial of the application ***623** for a rehearing that the represented 49 MW size of petitioner's facility was both a "significant factor" and a "material consideration" in the PSC's approval of the agreement, particularly its pricing provisions. It follows from the foregoing that the PSC's determination of the scope of its prior approval of the agreement between petitioner and NiMo was neither irrational nor arbitrary and unfair to petitioner and, therefore, it must be confirmed (*see, Matter of Long Lake Energy Corp. v Public Serv. Commn.,* 148 AD2d 84, *supra; Matter of New York State Cable Tel. Assn. v New York State Pub. Serv. Commn.,* 125 AD2d 3, *supra).* This conclusion renders academic the appeal from Supreme Court's order adhering to its original decision upon reargument.

Mahoney, P. J., Weiss, Mercure and Harvey, JJ., concur.

Judgment reversed, on the law, without costs, determination confirmed and petition dismissed.

Appeal from order dismissed, as academic, without costs. ***624**

N.Y.A.D.,1991.

INDECK-YERKES ENERGY V PSC

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Re Orange and Rockland Utilities, Inc.
Case 96-E-0728
New York Public Service Commission
November 29, 1996

STATE OF NEW YORK PUBLIC SERVICE COMMISSION

*1 At a Session of the Public Service Commission held in the City of Albany on November 6, 1996

COMMISSIONERS PRESENT:

John F. O'Mara, Chairman Eugene W. Zeltmann Harold A. Jerry, Jr. William D. Cotter Thomas J. Dunleavy

Case 96-E-0728 - Orange and Rockland Utilities, Inc. - Petition For a Declaratory Ruling That the Company and Its Ratepayers Are Not Required To Pay For Electricity Generated By a Gas Turbine Owned By Crossroads Cogeneration Corporation.

DECLARATORY RULING

(Issued and Effective November 29, 1996)

BY THE COMMISSION:

BACKGROUND

On August 12, 1996, Orange and Rockland Utilities, Inc. (O&R) filed a Petition For a Declaratory Ruling, asking for a declaration that the utility is not obligated to expand its purchases of electricity from Crossroads Cogeneration Corporation (Crossroads) under the existing contract between the two. O&R entered into that contract on October 8, 1987 with Crossroads' predecessor, Onsite/US Power Limited Partnership (Onsite). The contract was supplemented on January 21 and October 4, 1988, and was approved on December 2, 1988, upon the terms set forth in the latter supplement. [FN1]

According to O&R, the original agreement with Onsite provided for the purchase of electric capacity and energy from a plant designed to generate 3.3 MW nominally, and sized at no more than 4.0 MW of gross capacity. The utility complains that Crossroads has expanded its plant beyond the 3.3 MW and 4.0 MW size limits, by installing a 7 MW turbine, and plans to compel the utility to purchase at least some of the generation produced by the new turbine under the original contract.

O&R asks for a finding that it has no obligation to purchase that additional energy at the original contract prices.

On August 30, 1996, Crossroads replied to O&R. It maintains that, as a qualifying facility (QF) under federal and state law, it is exempt from state regulatory interference into its contract with O&R. Contending that O&R requests a contract interpretation that is both beyond our jurisdiction and contradicts our stated policies for addressing contract disputes, Crossroads asks that the petition be denied. The positions of the parties are set forth below.

POSITIONS OF THE PARTIES

According to O&R, its contract with Crossroads provides for the purchase of electricity from a plant nominally sized at 3.3 MW, and explicitly limits the purchase obligation to capacity produced from a plant of a maximum size of 4.0 MW, net of the capacity and energy directed to operating the plant. O&R stresses that the existing contract is priced significantly in excess of avoided cost, and was entered into in compliance with former contract pricing policies that are now expired and outmoded.

O&R reports that the plant commenced operation in December 1987, generating no more than 4.0 MW (gross) from three reciprocating engines that could be fueled with either oil or gas. Crossroads then assumed ownership from the original developer in 1990. In 1995, the utility complains, Crossroads announced its intention to install an additional 7 MW gas turbine at the site. O&R relates that, despite its refusal to purchase any of the generation produced from that new plant component under the original contract, Crossroads proceeded to complete installation and commence operation of the turbine by May 24, 1996.

***2** Crossroads intends, says O&R, to supplement production of the original plant with electricity produced by the new turbine, and demand payment for that electricity under the original contract. As O&R describes it, the original plant historically operated at a yearly availability factor of approximately 85% to 90%, and Crossroads will now enhance that factor to 100% by substituting the turbine's electricity for the original equipment's production, whenever any of the original equipment is not operating. According to O&R, this will force it and its ratepayers to pay approximately $430,000 per year more than contemplated under the contract, and, since the contract has a remaining life of ten years, the overpayment to Crossroads will total more than $4.3 million (nominal).

Conceding that the contract entitles it to exercise a right of first refusal for any increased generation produced at the Crossroads site, O&R asserts it declined to exercise that right. This decision was reasonable, it explains, because the original contract provides for pricing premised upon the 6[minimum rate and the long-run avoided cost (LRAC) estimates in effect in the 1980's. Current prices, the utility points out, are much lower. Compelling it to purchase the additional electricity under the original contract, the utility argues, would run counter to the policy of encouraging utilities to reduce their electric rates, and would 'needlessly expand the legacy of New York's misguided past energy policy.' [FN2] O&R concludes that a ruling advising that it has no obligation to purchase the additional energy would be consistent with the Public Service Law mandate to establish just and reasonable rates.

Crossroads' Response

Emphasizing that this controversy involves the sale of electric energy by a QF to a utility under a binding power purchase contract, Crossroads asserts that the dispute is beyond our jurisdiction. Citing the Freehold decision, [FN3] Crossroads maintains that state regulatory jurisdiction over this contract ended at the time it was approved. As a result, Crossroads believes that federal law would preempt a state regulatory effort to resolve disputes over this contract.

Moreover, Crossroads contends, we have repeatedly eschewed involvement in contract disputes like that O&R raises. [FN4] Under these precedents, Crossroads continues, it has been decided that these disputes are not unique to utility regulation, and are best resolved through negotiation or application of commercial law principles by the courts. The QF complains that O&R has not explained why it fails to concede that those precedents control under these circumstances.

Crossroads also maintains that this commercial dispute is more complex than O&R implies. Interpreting the provisions of the contract that allow the utility of right of first refusal, and permit the developer to expand capacity for sales to third parties, Crossroads discerns a concession by the utility that the plant could be enlarged. Crossroads contends further that installation of a gas turbine was an option reflected in the original plan for the facility that was provided to O&R in early 1986. Crossroads also argues that correspondence it received from O&R prior to the genesis of this dispute undermines the interpretation of the contract that the utility sets forth in its petition. As a result, the developer argues, the dispute cannot be decided on the basis of the facts that O&R has presented.

***3** Moreover, Crossroads maintains that the linchpin of O&R's position is that the contract limits availability of the existing plant to approximately 90%. According to the QF, however, the contract does not so provide, and instead permits the developer to sell electricity produced by up to 4.0 MW of generation capacity, without restricting the source of that capacity.

Conceding that we can assert jurisdiction to interpret or clarify policies that existed at a time a contract was approved, Crossroads notes that O&R does not request such an interpretation. According to the QF, it should be decided that it is the courts, rather than state regulatory agencies, that have continuing jurisdiction over the interpretation of this contract.

DISCUSSION AND CONCLUSION

As was recently reaffirmed, it is within our authority to interpret our power purchase contract approvals, [FN5] and that jurisdiction has been upheld by the courts. [FN6] The precedents involving interpretation of past policies and approvals, and not the contract non-interference policy that Crossroads cites, control here. As a result, the approval of the original contract for the Crossroads site may be explained and interpreted, and O&R's petition may be construed as requesting that relief. That approval was limited to a project consisting of three reciprocating engines, sized at a net capacity of 3.3 MW, with an estimated annual electrical output of 26,300 MWh. [FN7] Under the approval, therefore, Crossroads may not supplement electricity produced by its reciprocating engine capacity with electricity produced from its new turbine capacity.

To the extent that Crossroads raises a contract issue, it is that O&R has waived, modified or otherwise altered its obligations under the original agreement through its course of conduct in the years since the approval. Involvement in that dispute is eschewed, because of the contract non-interpretation policy Crossroads cites.

Under our approval of the contract for the Crossroads site, the QF may not expand the generation production entitled to the contract pricing. Instead, the approval of the contract was limited to production from a three reciprocating engine facility, sized at approximately 3.3 MW (net), with an annual output of about 26,300 MWh per year. [FN8] As O&R demonstrates, Crossroads intends to supplement the 3.3 MW of net production from the reciprocating engine generator sets with electricity from a 7.0 MW turbine, resulting in yearly production levels of approximately 35,040 MWh that far exceed the 26,300 MWh figure. [FN9] As a result, the expanded production made possible by Crossroads' new turbine is beyond the terms and conditions approved for this contract. [FN10]

Contrary to Crossroads' assertions, we may make such a determination. In fact, in Indeck-Yerkes Energy Services, the courts upheld our authority to find that a new contract was needed, under circumstances that resemble those here. There, the anticipated size for the plant discussed in the approval was approximately 49 MW, and 400,000 MWh of generation per year was expected. When the developer increased the size of the facility to 53.38 MW, it was determined that the additional production must be priced under a new contract, rather than the original contract. The court found both that we had the authority to determine the scope of our prior approval and that our determination was reasonable. [FN11]

***4** Moreover, the court specifically rejected an argument that the original contract provided for expansion of the facility -- the same argument Crossroads makes here. The court found that the right to expand could have been clearly set forth in the contract, but, as it was not, there was no basis for presuming that right. [FN12] Under the court's analysis, neither the right of first refusal accorded O&R nor the right to make third party sales accorded Crossroads in this contract constitute the kind of explicit right to expand that would have fallen within the initial approval, and the pricing contemplated there.

It was also decided in Indeck-Yerkes Energy Services that concern over a link between the pricing of a contract and the amount of capacity brought into production under that contract was appropriate. Here, the December 2, 1988 contract approval followed rejection of an earlier contract pricing formula, which might have provided for even higher payments to Crossroads. [FN13] Therefore, the pricing of the generation purchased under this contract was of concern, and there was a proper purpose to limiting, in the approval, the capacity that could receive the contract pricing.

After it was determined that the developer of the Indeck-Yerkes plant had added capacity to its facility beyond that contemplated under the approval of the contract, it was required to enter into a new contract to price that additional capacity. It did so, allocating generation produced from the capacity at the site between the two contracts. [FN14] Nothing in the approval of this contract exempts Crossroads from a similar obligation.

Crossroads, however, does raise a contract interpretation issue. Construing that issue in the light most favorable to Crossroads, it maintains that O&R, by its course of conduct after approval of the original agreement, has waived, modified, or otherwise altered either the requirements of that agreement or the relationship between the parties. Such a dispute implicates the contract non-interference policy established in the precedents that Crossroads cites. Therefore, involvement in that aspect of the dispute between O&R and Crossroads is eschewed.

Accordingly, we find and declare that the petition of Orange and Rockland Utilities, Inc. is granted in part, to the extent that the December 2, 1988 approval of Contract No. E-139 between O&R and Onsite (Crossroads' predecessor) is construed as limiting the contract pricing to electric production from the three reciprocating engine facility that was installed in 1987, and does not extend to production from the gas-fired turbine that was installed in 1996.

By the Commission,

(SIGNED) JOHN C. CRARY Secretary

FOOTNOTES

FN1 Case 28689, Orange and Rockland Utilities, Inc. and Onsite/US Power L.P. - Contract No. E-139, Letter Order (Issued December 2, 1988) and Staff Memorandum (November 21, 1988).

FN2 O&R Petition, p. 7.

FN3 Freehold Cogeneration Assocs. v. Bd. of Reg. Commissioners of New Jersey, 44 F.3d 1178 (3rd Cir. 1995), cert. den. 116 S.Ct. 68.

FN4 See Case 94-E-0205, Kamine/Besicorp Allegany L.P., Order Denying Petition and Counter-Complaint (Issued September 15, 1994); Case 92-E-0032, Erie Energy Associates, Declaratory Ruling (Issued March 2, 1992).

FN5 Case 95-E-1177, Niagara Mohawk Power Corporation, Order Directing Further Negotiations (Issued March 26, 1996); Case 89- E-1158, Consolidated Edison Company of New York, Inc., Order Clarifying Prior Order (Issued December 28, 1993).

FN6 Indeck-Yerkes Energy Services v. Public Service Commission, 114 A.D.2d 618 (3rd Dept., 1991); Indeck Energy Services of Yonkers v. Consolidated Edison Co. of N.Y., Inc., 93 Civ. 4528 (MVM)(S.D.N.Y., February 24, 1994).

FN7 Staff Memorandum, p. 1.

FN8 Staff Memorandum, pp. 1-2.

FN9 O&R Petition, Exh. D.

FN10 Case 90-E-0238, American Ref-Fuel Company of Hempstead, Declaratory Ruling (Issued August 22, 1990); Case 88-E-114, Indeck-Yerkes Energy Services, Inc., Declaratory Ruling (Issued September 14, 1988) and Order Denying Petition For Rehearing (Issued February 28, 1989) (Indeck Decisions).

FN11 Indeck-Yerkes Energy Services, Inc., 164 A.D.2d at 621-22.

FN12 Indeck-Yerkes Energy Services, Inc., 164 A.D.2d at 622.

FN13 Case 28689, Orange and Rockland Utilities, Inc. and Onsite/US Power L.P. - Contract No. E-139, Letter Order (Issued July 13, 1988).

FN14 Case 90-E-0084, Niagara Mohawk Power Corporation and Indeck-Yerkes Energy Services, Inc., Order Approving Contract Subject to Condition (Issued April 30, 1991).

END OF DOCUMENT

H

**1 Commission Opinions, Orders and Notices

Public Service Company of New Hampshire

v.

New Hampshire Electric Cooperative, Inc.,

Docket No. EL95-71-000

Order Denying Complaint and Declining to Initiate Purpa Enforcement Action

(Issued May 29, 1998)

***61995** Before Commissioners: James J. Hoecker, Chairman; Vicky A. Bailey, William L. Massey, Linda Breathitt, and Curt H (acute)ebert, Jr.

In this order, we act on a complaint filed by Public Service Company of New Hampshire (PSNH) seeking an interpretation of the power purchase obligations of New Hampshire Electric Cooperative, Inc. (NHEC) under the Amended and Restated Partial Requirements Service Agreement (APRA), under which NHEC purchases electricity from PSNH. [FN1] We hold that NHEC is obligated under Section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. § 824a-3 (1988) to purchase power from any qualifying facility (QF) that can deliver its power to NHEC, whether the QF is directly or indirectly interconnected with NHEC, and that any such purchases are not subject to PSNH's consent.

In addition, we will decline to initiate an enforcement action to invalidate orders of the New Hampshire Public Utilities Commission (New Hampshire Commission) determining NHEC's avoided costs.

I. Background

A. PSNH's Complaint

On August 14, 1995, PSNH filed a complaint against NHEC alleging that certain actions by NHEC constitute an anticipatory breach of the APRA. [FN2] Specifically, PSNH alleges that NHEC seeks to displace purchases from PSNH under the APRA with purchases at a lower cost from QFs to which NHEC is not directly connected. PSNH states that the APRA requires NHEC to purchase its entire electric power requirements from PSNH other than certain retained entitlements in the Seabrook and Maine Yankee nuclear plants and power it is compelled to obtain from non-utility suppliers "pursuant to the requirements of governmental authorities." PSNH submits that the exception for compelled purchases does not apply in this case. It asks the Commission to find that Section 210 of PURPA, 16 U.S.C. § 824a-3 (1988), does not compel NHEC to purchase QF power in the circumstances presented because PSNH stands ready to purchase the QF power at PSNH's avoided cost rates. Given PSNH's willingness to purchase the QF power, PSNH contends that there is adequate encouragement of cogeneration and small power production to permit waiver of NHEC's PURPA Section 210 purchase obligations. PSNH also asserts that under the Commission's regulations at 18 C.F.R. § 292.303 (1997), NHEC is not compelled to obtain power from QFs to which it is not directly connected unless PSNH consents ***61996** to the transaction by volunteering not to purchase power itself from the QF.

If, on the other hand, the Commission finds that NHEC is required by PURPA and the Commission's implementing regulations to purchase power from any non-interconnected QF, PSNH asks the Commission to find that NHEC is a full-requirements customer of PSNH, that its avoided cost is the avoided cost of PSNH, and that charges under the APRA should be adjusted to put PSNH in the same financial position it would have been had it purchased the QF power directly at its own avoided cost rate.

****2** PSNH notes that NHEC has obtained an order from the New Hampshire Commission authorizing it to issue a request for proposals (RFP) from QF suppliers to establish NHEC's long-run avoided costs for such purchases. [FN3] PSNH requests that if the Commission permits NHEC to establish an avoided cost through an RFP as approved by the New Hampshire Commission, the Commission also direct NHEC to include bids from all sources, rather than QFs only.

Finally, PSNH requests that the Commission revisit the continued appropriateness of Section 292.303(d) of our regulations in light of the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (1992) (EPAct) and an open transmission access environment. Section 292.303(d) provides that when a utility directly connected to a QF transmits the QF's power to another utility, the utility to which the power is transmitted must purchase the QF's power as if it were directly connected. PSNH states that the rule could be employed to permit QFs to shop for the utility with the highest administratively determined avoided cost to which they can economically transmit power, and limit that utility's access to lower priced power by forcing it to purchase QF power.

B. Notice and Responses

Notice of PSNH's complaint was published in the Federal Register, 60 Fed. Reg. 44,866 (1995), with comments, protests and motions to intervene due on or before September 22, 1995.

NHEC filed an answer in opposition and request for summary dismissal, a motion for leave to file an answer one day out of time, and a motion for alternative relief if PSNH's complaint is not summarily dismissed. NHEC contends that the APRA clearly contemplates QF purchases by NHEC and that the Commission's regulations at Section 292.303(a) clearly establish NHEC's QF purchase obligation. It further contends that cases cited by PSNH are distinguishable, that Section 292.303(d) is not relevant, and that PSNH is required to provide transmission service for QFs as a condition of the Commission's approval of the Northeast Utilities (NU) and PSNH merger. [FN4] NHEC characterizes PSNH's challenge to a QFs-only RFP for determining NHEC's avoided cost as an impermissible collateral attack on the New Hampshire Commission's final order. Finally, NHEC states that there is no need to revisit the need for Section 292.303(d) of our regulations. If PSNH's complaint is not dismissed, NHEC requests a review of PSNH's compliance with the merger conditions.

PSNH filed an answer to NHEC's request for summary dismissal and motion for alternative relief. PSNH equates NHEC's request for summary dismissal with a motion to dismiss the complaint, to which PSNH may respond. Alternatively, PSNH seeks leave to answer NHEC's filing. PSNH's answer also incorporates its answer to NHEC's motion for alternative relief.

NHEC responded with a motion to strike PSNH's answer to NHEC's request for summary dismissal and, in the alternative, a response opposing PSNH's motion for leave to file pleading. PSNH then filed an answer to NHEC's motion to strike.

****3** On November 27, 1995, PSNH filed a motion for expedition, citing a request by a QF for transmission service to NHEC. NHEC filed a response in support of PSNH's motion, asserting that PSNH is frustrating an agreement between the QF and NHEC by failing to provide transmission service.

The New Hampshire Commission filed a notice of intervention raising no substantive issues.

A motion to intervene was filed by Baldwin Hydroelectric Corporation (BHC). BHC is the licensee for the 4 MW Baldwin Hydroelectric Project No. 7962. BHC has commenced construction of its project, but indicates that completion of construction has been stalled by the ***61997** lack of a power purchase contract. BHC states that it is in NHEC's service territory and that it has offered to sell the output of its project to NHEC, but that NHEC has refused to negotiate with BHC owing to the dispute with PSNH. BHC avers that PSNH is trying to thwart the purposes of PURPA, thereby jeopardizing BHC's project and its investment. [FN5]

An untimely motion to intervene and for expedition was filed on July 30, 1997, by Waste Management of New Hampshire, Inc. (WMNH) and Bio-Energy Partners (BEP). WMNH and BEP state that WMNH owns and operates a landfill in Rochester, New Hampshire, and that gas is extracted from the landfill to fuel a QF at the landfill owned by BEP. They further state that WMNH is constructing additional generating units at the Rochester landfill which will increase the QF's generating capacity. They state that WMNH executed a power purchase agreement with NHEC in January 1997, under which power from the facility expansion will be sold to NHEC. They state that WMNH's sale to NHEC cannot commence until this proceeding has been resolved, because the QF is outside NHEC's service area and output from the facility expansion will be transmitted to NHEC via PSNH's transmission system. WMNH and BEP support NHEC's position.

WMNH and BEP state that the Commission should permit their late intervention because they had no interest in this proceeding until WMNH and NHEC executed the power purchase agreement in January 1997. They state that they will take the record as they find it, and that their intervention will not disrupt the proceeding or unduly burden the existing parties. They urge expedition in light of the proposed schedule for the facility expansion, and argue that PSNH's complaint should be dismissed.

PSNH filed a timely answer to WMNH's and BEP's motion. PSNH does not oppose their intervention, but disputes their arguments in support of NHEC's position.

On March 23, 1998, NHEC filed a motion for expedited action in this proceeding.

II. Discussion

A. Procedural Matters

Under Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (1997), the notice of intervention by the New Hampshire Commission and timely, unopposed motion to intervene of BHC serve to make them parties to this proceeding. Given the stage of the proceeding, their interest in the proceeding and the absence of any undue prejudice or delay, we find good cause to grant WMNH's and BEP's untimely, unopposed motion to intervene. 18 C.F.R. § 385.214(d) (1997).

****4** We find good cause to grant NHEC's late- filed answer to PSNH's complaint, given its direct interest in this proceeding and the absence of any undue prejudice or delay. We further find good cause to waive the provisions of Rule 213 of the Commission's Rules of Practice and Procedure, which prohibits answers to answers, and accept PSNH's answer and motion for alternative relief, because they assist in our understanding of the case. We therefore deny NHEC's October 25, 1995 motion to strike. We further accept the other answers to pleadings filed in this proceeding because they similarly assist in our understanding of the case.

B. NHEC's Purchase Obligation under PURPA and the APRA

The threshold issue in this proceeding is the extent of NHEC's obligation under the APRA, Section 210 of PURPA, and the Commission's regulations to purchase power from QFs (or other entities) to which it is not directly interconnected. Section II of the APRA provides, in relevant part:

> [PSNH] is obligated to provide, and [NHEC] is obligated to purchase, the entire electric power requirements ("Resale Service") of [NHEC] and its retail customers at all points of delivery identified in Exhibit D hereto . for use in all areas of [NHEC's] service territory served by such delivery points, less the amount of power equal to the power secured by [NHEC] from (I) [NHEC's] 0.7356% interest in the Maine Yankee unit, (ii) an independent power producer or other non-utility supplier, where [NHEC's] purchase from the supplier is pursuant to the requirements of governmental authorities, (iii) [NHEC's] 2.17391% interest in the Seabrook unit. (emphasis added)

PSNH contends that clause (ii) requires NHEC to purchase from PSNH its entire [FN6] electric requirements, with the exception of the retained ownership entitlements in the Seabrook ***61998** and Maine Yankee plants and non-utility generation it is "compelled" to purchase. PSNH construes the explicit reference to non- utility generation as simply reflecting the QF purchase obligation of Section

210 of PURPA and our regulations. [FN7] PSNH interprets Section 292.303(d) of our regulations [FN8] as not requiring NHEC to purchase power from QFs to which it is not directly interconnected, unless PSNH consents to the transaction by agreeing to transmit the QF's power in lieu of purchasing the power at its own avoided cost rate.

NHEC responds that Section 292.303(d) is not relevant because it applies only to permit a directly connected utility otherwise obligated to purchase QF power to escape that obligation, with the QF's consent, by transmitting the QF power to another purchaser. The rule was not intended, states NHEC, to create in the directly connected utility a "right of first refusal" to purchase QF power. It further avers that PSNH is obligated to provide transmission service for QFs as a condition of the Commission's approval of the NU and PSNH merger.

PSNH replies that, however Section 292.303(d) is interpreted, NHEC has bargained away in the APRA whatever opportunity it might have had for voluntary purchases from QFs outside of its service territories. PSNH argues that the language in Section II of the APRA, stating that NHEC is obligated to purchase "the entire electric power requirements" from PSNH less its purchases from Maine Yankee and Seabrook and less its purchases from "an independent power producer or other non-utility supplier, where [NHEC's] purchase from the supplier is pursuant to the requirements of governmental authorities," means that NHEC may purchase QF power only when "compelled." PSNH further states that its transmission tariffs filed pursuant to approval of the NU/PSNH merger apply only to support purchases NHEC may lawfully make. Thus, PSNH does not concede any transmission obligation with respect to voluntary purchases from such QFs.

****5** Pursuant to the terms of Section II of the APRA, PSNH "is obligated to provide, and [NHEC] is obligated to purchase, the entire electric power requirements of [NHEC] and its retail customers." The only exceptions to this broad requirement are NHEC's non-discretionary power interests in Maine Yankee and Seabrook and its non-discretionary power purchases from independent power producers and other non-utility suppliers. Thus, NHEC must purchase all of its, and its retail power customers', remaining power needs from PSNH, and any non-discretionary power purchases from independent power producers and other non-utility suppliers can only serve to reduce the amount of power PSNH is obligated to provide.

However, there is nothing on the face of the APRA to indicate that QF purchases by NHEC are limited to QFs directly connected to NHEC. Nor does Section 210(a) of PURPA contain such a limitation. Instead, Section 210(a) of PURPA provides generally that electric utilities must offer to purchase electric energy from any QF that can deliver power to the utility. If PSNH had intended to impose a restriction on the generally applicable purchase obligation of PURPA, it should have insisted that the contract so provide. [FN9] However, even if PSNH had such a limitation in mind when the APRA was negotiated, PSNH and NHEC cannot lawfully bargain away any portion of the rights QFs enjoy under PURPA or NHEC's statutory purchase obligation under PURPA, ***61999** our implementing regulations, or any rights QFs may subsequently have obtained in the context of the NU/PSNH merger or the open transmission access requirements of Order No. 888. [FN10]

C. Whether PSNH Must Consent to Transmit QF Power

We do not agree with PSNH's view that NHEC's purchase obligation to QFs to which it is not directly interconnected comes into play only when PSNH is willing to transmit QF power. Neither Section 210 of PURPA nor Section 292.303(d) of the Commission's regulations provides any such limitation. Section 210(a) of PURPA requires electric utilities to purchase electric energy from QFs pursuant to regulations promulgated by the Commission. Section 292.303 provides:

Electric utility obligations under this subpart.

(a) Obligation to purchase from qualifying facilities. Each electric utility shall purchase . any energy and capacity which is made available from a qualifying facility:

(1) Directly to the electric utility; or

(2) Indirectly to the electric utility in accordance with paragraph (d) of this section.

CTR***

(d) Transmission to other electric utilities. If a qualifying facility agrees, an electric utility which would otherwise be obligated to purchase energy or capacity from such qualifying facility may transmit the energy or capacity to any other electric utility. Any electric utility to which such energy or capacity is transmitted shall purchase such energy or capacity under this subpart as if the qualifying facility were supplying energy or capacity directly to such electric utility. The rate for purchase by the electric utility to which such energy is transmitted shall be adjusted up or down to reflect line losses . and shall not include any charges for transmission.

****6** 18 C.F.R. § 292.303 (1997). Moreover, Section 292.101(b)(2) defines purchase as:

Purchase means the purchase of electric energy or capacity or both from a qualifying facility by an electric utility.

18 C.F.R. § 292.101(b)(2) (1997).

Section 292.303(d) in no way narrows this broad requirement to purchase. The section creates no "right to purchase" in the directly connected utility, nor does it create an obligation on the part of the QF to sell to the directly connected utility. It provides only that a utility obligated to purchase power from a QF may seek, with the QF's consent, to transmit the energy to another utility.

In Order No. 69, which promulgated Section 292.303, the Commission commented on the extent of a utility's obligation under PURPA to purchase QF power. The Commission stated:

Section 210(a) of PURPA provides that the Commission prescribe rules requiring electric utilities to offer to purchase electric energy from qualifying facilities. The Commission interprets this provision to impose on electric utilities an obligation to purchase all electric energy and capacity made available from qualifying facilities with which the electric utility is directly or indirectly interconnected. (emphasis added). [FN11]

Because at that time a QF could not compel a directly connected utility to transmit its power to another utility, the Commission provided that if a directly connected utility did not wish to purchase particular QF power, it could transmit the power to another utility with the consent of the QF. The Commission also provided that if any directly connected utility chooses not to transmit power, it retains the purchase obligation. [FN12]

The regulatory context is now quite different from that which existed when Section 292.303(d) was promulgated. Virtually all public utilities that own interstate transmission facilities now provide open access transmission services pursuant to Order No. 888 and QFs are among the entities eligible to receive such service. [FN13] Order No. 888 in no way limits an electric utility's statutory purchase obligations under PURPA. Thus, the situation addressed ***62000** in Section 292.303(d) no longer exists=the directly connected utility no longer can prevent the sale of QF power to an indirectly connected utility by refusing transmission service. QFs are no longer dependent on the directly connected utilities' agreement to provide transmission service to sell to indirectly connected utilities. Any QF may employ NU's or the New England Power Pool's open access transmission tariff to reach NHEC and require NHEC to purchase that QF's power. [FN14] Thus, the dispute between PSNH and NHEC over whether NHEC can, under the APRA, solicit power from QFs has little or no meaning. That NHEC is not directly connected to the QF does not obviate its purchase obligation under PURPA. Similarly, NHEC's desire or lack thereof to purchase a QF's power in no way affects the QF's right to sell power.

****7** PSNH's reliance on Florida Power and Light and Utah Power and Light Company, 57 FERC P 61,363 (1991), reh'g denied, 59 FERC P 61,035 (1992) (Utah Power and Light I) in this regard is misplaced. Florida Power and Light is a declaratory order that resolved several questions concerning transmission of QF power. In Utah Power and Light I the Commission reaffirmed on remand from the court its decision to exclude QFs from the transmission access requirements imposed on the merger between PacifiCorp and Utah Power and Light. [FN15] PSNH cites language in these orders, following Order No. 69, indicating that a utility directly interconnected with a QF has the discretion to determine whether to purchase QF power itself or to transmit it to another utility. [FN16] This language simply interpreted the boundaries of the purchase obligation reflected in Section 292.303(d) in light of the state of transmission access at that time and predates Utah Power and Light II [which as noted reversed the Commission's earlier determination (see n.15 supra), the NU/PSNH merger, and Order No. 888.

D. Waiver of NHEC's Purchase Obligation

PSNH also contends that the Commission would, if requested, waive any obligation of NHEC to purchase QF power that PSNH would itself purchase. PSNH reasons that because it stands willing to purchase QF power, purchases by NHEC are unnecessary to promote cogeneration and small power production. In this connection, it cites Oglethorpe Power Corporation, 32 FERC P 61,103 (1985), aff'd 35 FERC P 61,069 (1986), aff'd sub nom. Greensboro Lumber Company v. FERC, 825

F.2d 518 (D.C. Cir. 1987) (Oglethorpe), and Seminole Electric Cooperative, Inc., 39 FERC P 61,354 (1987) (Seminole). In those cases, we waived the purchase obligation of distribution cooperative utilities at their request where purchases from QFs would be made on behalf of those utilities by their generation and transmission cooperative utility acting on behalf of its member cooperatives. We found that as long as no QF would be deprived of a market for its power at the purchasing utility's avoided cost, the statutory purpose of promoting cogeneration and small power production was served. [FN17]

NHEC responds that its purchase obligation applies unless it has sought and failed to obtain a waiver, that even if it applied for a waiver there is no assurance one would be granted, and that PSNH has no standing to seek a waiver on behalf of NHEC. NHEC states that unlike Oglethorpe and Seminole, PSNH cannot be said to be acting on NHEC's behalf or in its interest. PSNH dismisses this, stating that the critical factor is that the entity responsible for supplying power to the member cooperatives ensured a market for QF power, and PSNH is likewise obligated to procure power to meet NHEC's requirements and will purchase QF power.

Even if PSNH provides a market for QF power that might otherwise be sold directly to NHEC, the waivers in Oglethorpe and Seminole were requested by the entities with a purchase obligation and mutual interests. NHEC has no obligation to seek a waiver and we would not impose one upon it at another party's request. [FN18] Moreover it would be inconsistent with our open access policies to prevent QFs from seeking to participate fully in the competitive market. In this connection, although NHEC has an obligation to purchase from any QF which can transmit power to it, our rules provide that the parties to QF purchases are free to negotiate purchase rates ***62001** other than avoided cost. [FN19] A more competitive environment is expected to foster such outcomes. [FN20]

E. NHEC's Avoided Cost

****8** PSNH believes that the New Hampshire Commission has erroneously determined NHEC's avoided costs. [FN21] [FN22] In essence, PSNH is requesting that this Commission bring an action in federal district court pursuant to Section 210(h)(2) of PURPA against the New Hampshire Commission for violating PURPA. We decline to do so. While our precedent makes clear that a state must take into account all potential sources of capacity in determining avoided costs, [FN23] the New Hampshire Commission has explicitly recognized that precedent. Accordingly, we view PSNH's arguments to involve the details of the state's avoided cost implementation. We will not institute an enforcement action in this circumstance.

Conclusion

As discussed above, we deny PSNH's request to find that NHEC's QF purchase obligation with respect to QFs to which NHEC is not directly connected applies only when PSNH consents to transmit the QF power. Rather, NHEC's purchase obligation applies whenever a QF is able to have its power transmitted to NHEC.

The Commission orders:

(A) All motions are granted or denied as discussed in the body of this order.

(B) PSNH's complaint is denied as discussed in the body of this order.

FN1 In a related order issued this same day in Docket No. EL96-53- 000, we act on another complaint by PSNH against NHEC. That docket concerns NHEC's obligations and PSNH's charges under the APRA. Although the same contract is at issue in Docket No. EL96-53-000, the issues raised are different. See Public Service Company of New Hampshire v. New Hampshire Electric Cooperative, Inc., 83 FERC P << (1998).

FN2 The APRA is on file with the Commission as Northeast Utilities/Public Service Company of New Hampshire, FERC Rate Schedule No. 142.

FN3 New Hampshire Electric Cooperative, Inc., Order Approving Offer of Settlement and Addressing Calculation of Long-Term Avoided Costs, Order No. 21,767 (July 31, 1995), Docket No. DR 94-160 (N.H.P.U.C.). That order is attached as Appendix A to PSNH's complaint.

FN4 See Northeast Utilities Service Company, 56 FERC P 61,269 (1991), order on reh'g, 58 FERC P 61,070, reh'g denied, 59 FERC P 61,042 (1992), order granting motion to vacate and dismissing request for rehearing, 59 FERC P 61,089 (1992), aff'd in part and remanded in part, Northeast Utilities Service Company v. FERC, 993 F.2d 937 (1st. Cir. 1993). Of course, PSNH is also required to provide transmission service for QFs under Order No. 888. See n.10 infra.

FN5 Orders granting extensions of time for BHC to complete construction were issued under delegated authority by the Commission's Office of Hydropower Licensing on March 15, 1995, and December 6, 1996. In a January 14, 1998 status report, BHC reports that it is still actively pursuing a power purchase agreement.

FN6 The APRA applies only to certain delivery points of NHEC, but these evidently constitute the great bulk of NHEC's load, and deliveries from other suppliers at other delivery points are not at issue in this proceeding.

FN7 New Hampshire's Limited Electric Energy Producers Act, N.H. Rev. Stats. Ann. §362-A:3 (LEEPA) requires utilities to purchase power from certain smallpower producers. The parties use the term "QF" to apply to purchases made pursuant either to PURPA or to LEEPA. For convenience, we will do the same.

FN8 Section 292.303(d) states, in relevant part:

(D) Transmission to other electric utilities. If a qualifying facility agrees, an electric utility which would otherwise be obligated to purchase energy or capacity from such qualifying facility may transmit the energy or capacity to any other electric utility. Any electric utility to which such energy or capacity is transmitted shall purchase such energy or capacity under this subpart as if the qualifying facility were supplying energy or capacity directly to such electric utility.

18 C.F.R. § 292.303(d) (1997).

FN9 NHEC offers extrinsic evidence in the form of statements made by PSNH officials in various fora to support its position that the APRA contemplates purchases from QFs wherever located. NHEC Answer at 22-27. PSNH responds that none of the statements refer to QF purchases from outside of NHEC's service territories and that it is not merely the APRA that restricts NHEC's ability to purchase from "off-system" QFs, but the APRA's reference to NHEC's obligation to purchase from a non-utility supplier pursuant to the requirements of governmental authorities. PSNH states that any obligation of NHEC to purchase under PURPA is limited by Section 292.303(d). PSNH Answer of October 10, 1995, at 14-16. As we have concluded that the contract is sufficiently clear in this regard, and that, in any event, parties cannot contract away non-parties' rights under PURPA or under Order No. 888, we see no need to resort to NHEC's extrinsic evidence.

FN10 See Promoting Wholesale Competition Through Open Acess Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (1996), FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996 P 31,036 (1996), order on reh'g, Order No. 888-A, 62 Fed. Reg. 12,274 (1997), FERC Statutes and Regulations P 31,048 (1997), order on reh'g, Order No. 888-B, 81 FERC P 61,248 (1997), order on reh'g, Order No. 888-C, 82 FERC P 61,046 (1998).

FN11 Order No. 69, FERC Statutes and Regulations 1977-1981 P 30,128, at p. 30,870.

FN12 Order No. 69, FERC Statutes and Regulations 1977-1981 P 30,128, at pp. 30,870-72. See also Florida Power & Light Company, et al., 29 FERC P 61,140, at p. 61,293 (1984) (Florida Power and Light).

FN13 Order No. 888, FERC Statutes and Regulations at p. 31,688.

FN14 For this reason, we need not address PSNH's argument that its transmission tariffs filed pursuant to the NU/PSNH merger do not require it to provide transmission of QF power to NHEC.

FN15 The Commission subsequently reversed its decision in this regard in light of changes in the Commission's statutory authority with regard to wheeling in EPAct. See Utah Power and Light Company, et al., 62 FERC P 61,018 (1993), reh'g denied, 62 FERC P 61,236 (1993) (Utah Power and Light II).

FN16 See 29 FERC at p. 61,293 (Florida Power and Light) and 57 FERC at pp. 62,183 and 62,188 (UtahPower and Light I).

FN17 32 FERC at p. 61,285 (Oglethorpe); 39 FERC at p. 62,112 (Seminole).

FN18 NHEC's purchases under the APRA are governed by the rates set forth in that agreement. There is no indication that the ARPA rates are the same as PSNH's avoided costs.

FN19 A negotiated rate for the QF sale is always permitted.

FN18 C.F.R. § 292.301(b) (1997) provides:

Negotiated rates or terms. Nothing in this subpart:

(1) Limits the authority of any electric utility or any qualifying facility to agree to a rate for any purchase, or terms or conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be required by this subpart.

FN20 The New Hampshire Commission noted:

As a matter of general policy, with the evolution of wholesale competition we believe that utilities should be allowed to lower their power costs through transactions which fall within the parameters of their legal obligations, even if those actions negatively affect a utility's other suppliers. If NHEC can implement competitive bidding procedures that enable it to lower its supply costs consistent with itsobligations under APRA, then it may proceed to issue the proposed RFP. It is in the public good and consistent with least cost planning principles to encourage utilities to allow their customers to share in the benefits of the competitive wholesale market.

Order No. 21,767, Attachment A to complaint, at 19.

FN21 New Hampshire Electric Cooperative, Inc., Long-Term Avoided Cost Rates, Order Approving Competitive Bidding Methodology to Determine Long-Term Avoided Costs, Order No. 21,398 (Oct. 23,1994), Docket No. DR 94-004 (N.H.P.U.C.) attached as Appendix B to NHEC's answer; New Hampshire Electric Cooperative, Inc., Least Cost Integrated Plan, Order Approving Offer of Settlement and Addressing Calculation of Long-Term Avoided Costs, Order No. 21,767, (implementing Order No. 21,398) (July 31, 1995), Docket No. DR 94-160 (N.H.P.U.C.) attached as Attachment A to PSNH's complaint.

FN22 And as noted above, a negotiated rate for the QF sale is always permitted.

FN23 See Southern California Edison Company and San Diego Gas and Electric Company, 70 FERC P 61,215 (1995), order on reconsideration, 71 FERCP 61,269 (1995).

Federal Energy Regulatory Commission

83 FERC P 61,224, 1998 WL 272964 (F.E.R.C.)

END OF DOCUMENT

H

Supreme Court of Idaho.

AFTON ENERGY, INC. Complainant,
v.
IDAHO POWER COMPANY, Respondent.
IDAHO POWER COMPANY, Appellant,
v.
AFTON ENERGY, INC. and Idaho Public Utilities Commission, Respondents.

No. 16067.

Dec. 2, 1986.

Power company moved Public Utilities Commission to declare particular payment option of contract entered into between power company and cogenerated small power producer for purchase of power in effect. The Public Utilities Commission, Perry Swisher, President, dismissed the motion, reading it as contract interpretation request, and holding that district court was proper forum to interpret contracts. Power company appealed.
The Supreme Court, Donaldson, C.J., held that: (1) district court, rather than Public Utilities Commission, was proper body to entertain action requesting interpretation of contract, and (2) power company or power producer could file application with Commission requesting that contract be modified, but before Commission could modify contract, it had to balance effect contract was having on financial condition of utility, its stockholders and customers, with benefits to utility power supply system as whole.

Affirmed.

Shepard, J., filed dissenting opinion.

West Headnotes
[1] Administrative Law and Procedure ⚷305
15Ak305 Most Cited Cases
[1] Public Utilities ⚷161
317Ak161 Most Cited Cases
Public Utilities Commission's jurisdiction is limited and has to be found entirely in enabling statutes. I.C. § 61-501.
[2] Public Utilities ⚷145.1
317Ak145.1 Most Cited Cases
(Formerly 317Ak145)
Public Utilities Commission has no jurisdiction to take away utility's freedom of contract, so long as contract is not inimical to public interest, and must consider private contracts when involved in rate-making process.
[3] Public Utilities ⚷146
317Ak146 Most Cited Cases
Generally, interpretation of contracts does not fall within Public Utilities Commission's jurisdiction.
[4] Electricity ⚷11(3)
145k11(3) Most Cited Cases
District court, rather than Public Utilities Commission, was proper forum for interpretation of contract entered into between power company and cogenerated small power producer for purchase of power, where power company and power producer had not agreed to allow Commission to interpret contract, contract, although complex, did not require any particular expertise in rate-making area to interpret disputed provision, and parties had agreed that one of two alternative rates provided in contract was applicable.
[5] Public Utilities ⚷115
317Ak115 Most Cited Cases
Public utility has right to enter into private contract, but state can modify that contract when it falls outside parameters of appropriate standard.
[6] Electricity ⚷11(3)
145k11(3) Most Cited Cases
Power company or cogenerated small power producer that were parties to contract for purchase of power could file application with Public Utilities Commission requesting that contract be modified, but before Commission could modify contract, it had to balance effect contract was having on financial condition of utility, its stockholders and customers, with benefits to utility power supply system as whole; if Commission determined, after applying balancing process, that contract was not fair, just, and reasonable, Commission could amend

contract by order.

****401 *926** Jim Jones, Atty. Gen., Michael S. Gilmore, Deputy Atty. Gen., Idaho Public Utilities Com'n, Boise, for respondent, I.P.U.C.

David G. Gadda of Boise Cascade Corp., Boise, for amicus curiae Independent Power Producers Council, Inc.

Paul E. Levy of Levy Law Offices, Boise, for amicus curiae, Paul E. Levy.

Larry D. Ripley, Barton L. Kline, and Paul L. Jauregui of Evans, Keane, Koontz, Boyd & Ripley, Boise, for appellant, Idaho Power.

Owen H. Orndorff and Wayne L. Kidwell of Orndorff, Kidwell, MacConnell & Peterson, Boise, for respondent, Afton Energy, Inc.

DONALDSON, Chief Justice.

This appeal is a continuation of the proceedings previously considered by the Court in *Afton Energy, Inc. v. Idaho Power Company,* 107 Idaho 781, 693 P.2d 427 (1984) (*Afton I* and *Afton III*). [FN1] In that case, we affirmed an Idaho Public Utilities Commission (Commission) order that required Idaho Power to purchase power from Afton pursuant to a fixed-term contract. Now, Idaho Power is back before the Court seeking a modification of the ****402 *927** Commission order to comply with our holding in *Afton I.* Before we address the issues presented in this appeal, a brief summary of the prior proceedings is needed to clarify the position of the parties.

FN1. The original decision was issued on January 11, 1984. (*Afton I*). Idaho Power petitioned for a rehearing and the case was reargued. On July 12, 1984, a second opinion was issued (Afton II) modifying *Afton I.* Afton Energy then petitioned for a rehearing. On December 20, 1984, the Court withdrew Afton II, and issued a third opinion (*Afton III*). *Afton III* modified *Afton I* and became final without further petition.

I

In 1978, Congress, to combat a nationwide energy shortage, enacted the Public Utility Regulatory Policy Act (PURPA). Specifically, § 210 (16 U.S.C. § 824a-3) and the related regulations thereto, require utilities to purchase power from qualifying co-generated small power producers (CSPPs) at the utility's avoided cost rates. Afton Energy, a CSPP located in Afton, Wyoming, unsuccessfully attempted to sell Idaho Power the output of its qualifying co-generation facility. After negotiations broke off, Afton filed a complaint with the Commission requesting the Commission to "immediately order Idaho Power to enter into the attached power sales agreement and to furthermore cooperate in good faith and in an expeditious manner to consummate the sale of its power to Idaho Power."

Idaho Power, by answer, denied that the Commission had jurisdiction to order it to enter into the contract attached to Afton's complaint because it was not freely negotiated. The Commission, in Order No. 17478, agreed with Idaho Power that it could not dictate contract terms, but did hold that it had the authority and duty under PURPA to require utilities to purchase power pursuant to firm agreements with the CSPPs. The Commission thereby ordered Idaho Power to "agree to purchase from Afton Energy, Inc., co-generated power in the amount and for the time period tendered by Afton at the avoided cost rate for Idaho Power Company...."

Idaho Power still disputed the legal authority of the Commission to make such an order. However, it complied and contracted to purchase power from Afton. The parties negotiated two payment options, the binding option dependent upon this Court's determination of the Commission's authority. Article IV of the contract defined the payment options. The first option provided that payments from Idaho Power would be fixed and would remain in full force and effect for the entire 35-year term of the contract. On the other hand, the second option provided that rates would be fixed for the first ten years of the contract only, and subsequently would allow for downward adjustment if Idaho Power's avoided cost rate should be reduced in the future.

Another clause, art. XIII, was entitled *Legal Disputes.* It provided that, if as a result of a legal determination, the Commission has authority to; (1)

dictate rules, terms and conditions, or (2) order Idaho Power to enter into contracts, then the first payment option is in effect. Otherwise, the second payment option will be binding on the parties.

Idaho Power submitted its compliance filing to Order No. 17478. The filing recited that "there remains a legal dispute between Idaho and Afton but such dispute has not prevented the execution of the contract." In Order No. 17495, the Commission approved the contract, including both payment options, but refused to declare which option is binding. The Commission announced that in keeping with its policy it will not dictate the terms of individual contracts. The Commission stated:

> "No further purpose would be served by keeping the legal dispute alive under these circumstances.
> The Commission finds that the public interest would not be compromised by either of the two alternatives sketched in the Power Sales Agreement. The result is an extremely cumbersome contract that apparently serves the needs of these two parties. It certainly has no precedential value in dealing with other parties.
> In keeping with our policy announced repeatedly in past Commission orders, we will not dictate the terms of individual contracts and such individually negotiated contracts shall be respected and approved to the extent that they do not violate the public interest. The Power Sales Agreement between Afton and Idaho Power is therefore approved as filed with either or both ****403 *928** of the alternatives spelled out in Articles IV and XIII."

Public Utilities Commission Order No. 17495, p. 5.

Idaho Power appealed to this Court, raising the issue of whether the Commission had jurisdiction to order Idaho Power to enter into the contract with Afton. We held that the Commission did indeed have the authority to do so and affirmed Order Nos. 17478 and 17495. *Afton Energy, supra* at 789, 693 P.2d at 435. Our Afton III opinion clarified the standard of review to be utilized by the Commission when reviewing the contract. We held that the Commission should apply the fair, just and reasonable standard in a manner not inconsistent with the federal law. *Afton Energy, supra* at 793, 693 P.2d at 439.

II

The present proceeding was initiated by Idaho Power when it moved the Commission to modify Orders Nos. 17478, 17495 and 17609 [FN2] to conform to the Afton I/III decision and declare the second payment option of the contract in effect. Apparently, Idaho Power interpreted Afton I/III as ruling in its favor and selecting its preferred payment option. The Commission, reading the motion as a contract interpretation request, dismissed it, holding that the district court is the proper forum to interpret contracts. Idaho Power petitioned for a rehearing, which was denied by the Commission. This appeal has followed.

> FN2. Commission Order No. 17609 denied Idaho Power's Petition for Rehearing on Order Nos. 17478 and 17495.

Idaho Power wants us to determine whether our Afton I/III decision dictated the payment option which allows for downward adjustment of the rates to be binding on the parties. We refuse to do so and affirm the decision of the Commission.

It is important to note what relief Idaho Power is asking for. They entered into a contract with Afton to buy power. The agreement contained two alternative payment options, the binding alternative to be chosen based on a certain legal determination. Now, Idaho Power wants the Commission to interpret the contract and find that, based on our Afton I/III decision, its preferred payment option is in effect. As such, it requests the Commission to modify a previous order directing Afton to comply with the contract as interpreted by Idaho Power.

[1][2][3] The Commission generally has jurisdiction to hear matters presented to it regarding the regulation and supervision of public utilities. I.C. § 61-501. *Grever v. Idaho Telephone Company,* 94 Idaho 900, 499 P.2d 1256 (1972). But the Commission's jurisdiction is limited and has to be found entirely in the enabling statutes. *Arrow Transportation Company v. Idaho Public Utilities Commission,* 85 Idaho 307, 379 P.2d 422 (1963). Specifically, the Commission has no jurisdiction to take away a utility's freedom of contract (so long as the contract is not inimical to the public interest) and must consider private contracts when involved

in the rate-making process. *Agricultural Products v. Utah Power & Light,* 98 Idaho 23, 557 P.2d 617 (1976). As such, the interpretation of contracts, as a general rule, does not fall within the Commission's jurisdiction. *Lemhi Telephone Company v. Mountain States Telephone & Telegraph Co.,* 98 Idaho 692, 571 P.2d 753 (1977); *Bunker Hill Co. v. Washington Water Power Co.,* 101 Idaho 493, 616 P.2d 272 (1980). As this Court stated in *Lemhi:*

> "Generally, construction and enforcement of contract rights is a matter which lies in the jurisdiction of the courts and not in the Public Utilities Commission. This is true notwithstanding that the parties are public utilities or that the subject matter of the contract coincides generally with the expertise of the commission.
> If the matter is a contractual dispute, it should be heard by the courts." *Id.* at 696, 571 P.2d at 757.

****404 *929** [4] The Court has recognized exceptions to this rule. In *Bunker Hill Co. v. Washington Water Power Co., supra,* we allowed the Commission to interpret an unprecise contract because "the parties agreed to let the PUC settle this dispute and since there is substantial evidence in the record to support the commission's decision...." *Bunker Hill Co. v. Washington Water Power Co.,* 98 Idaho 249, 252, 561 P.2d 391, 394 (1977). Additionally, the Commission can use its expertise and supply a reasonable contract rate where the parties have an existing contract but are unable to agree to the specific rate. *F.M.C. Corp. v. Idaho Public Utilities Commission,* 104 Idaho 265, 658 P.2d 936 (1983). Here, however, the contract between Afton and Idaho Power does not fall within any of the exceptions. Idaho Power and Afton have not agreed to allow the Commission to interpret the contract. The contract, while being complex, does not require any particular expertise in the rate-making area to interpret the disputed provision, and the parties have agreed that one of two alternative rates is applicable.

Idaho Power certainly has a right to a legal determination of the disputed contract provision. However, it chose the wrong forum to settle the dispute. The district court, and not the Commission, is the proper body to entertain this suit.

[5] This is not to say that the Commission can never modify the terms of the contract. The state, through the Commission, has the right to regulate public utilities. As this Court stated many years ago:

> "It is held uniformly and universally that the power to supervise and regulate rates or charges for services rendered by public utilities is an inherent function of government, and occupies a large place within the domain of the police powers of the state." *Sandpoint Water & Light Co., Ltd., v. City of Sandpoint,* 31 Idaho 498, 501, 173 P. 972, 973 (1918).

Also in discussing the police power we have stated more recently:

> "Pursuant to that power, it has been settled that the state may fix rates for a public utility service which will supersede rates previously fixed by private contract. Interference with private contracts by the state regulation of rates is a valid exercise of the police power, and such regulation is not a violation of the constitutional prohibition against impairment of contractual obligations. [Citation omitted.] A Public Utility Commission may thus annul or supersede contract rates between utilities and their customers. [Citations omitted.] Private contracts with utilities are regarded as entered into subject to reserved authority in the state to modify the contract in the public interest." *Agricultural Products v. Utah Power & Light Co.,* 98 Idaho 23, 29, 557 P.2d 617, 623 (1976).

A public utility has the right to enter into a private contract but the state can modify that contract when it falls outside the parameters of an appropriate standard. The appropriate standard for review of contracts between public utilities and small power producers was set forth in our Afton I/III decision. As we stated there:

> "An agreement such as one entered into between Afton Energy and Idaho Power, while not constituting a tariff, is a special type of contract.
> The Commission should apply the fair, just and reasonable standard, in a manner not inconsistent with the federal law to the extent that it may be applicable, to determine whether the rates need to be adjusted in this particular type of contract. In making this determination, the Commission must consider the effect of the contract on the utility, its stockholders and customers and the benefits to the utility power supply system which may be

realized through the development of co-generation facilities. We emphasize, however, that whether the rate paid by the utility is fair, just and reasonable is not dependent upon the profit or loss realized by the co-generator at any given time." *Afton Energy, supra* 107 Idaho at 793, 693 P.2d at 439.

[6] Accordingly, Idaho Power, or Afton for that matter, may file an application ****405 *930** with the Commission requesting that the contract be modified to satisfy the requirements of the *Afton I/III* standard. However, before the Commission can modify the contract, it must use the test set out in *Afton I/III* and repeated above. It must balance the effect the contract has on the financial condition of the utility, its stockholders and customers, with the benefits to the utility power supply system as a whole. After applying this process, and finding that the contract is not fair, just and reasonable, the Commission may amend the contract by order.

We would like to emphasize that Idaho Power is not requesting contract modification based on the *Afton I/III* standard. It has simply asked the Commission, through a motion to modify a previous order, to declare that one of two freely negotiated payment options is in effect as selected by a legal determination of this Court. In other words, Idaho Power has asked for an interpretation of its contract. The district court is the proper forum for this action. We hold that the Commission acted properly when it dismissed Idaho Power's motion to modify previous orders.

Costs to respondent.

No attorney fees on appeal.

BAKES, BISTLINE and HUNTLEY, JJ., concur.

SHEPARD, Justice, dissenting.

The majority states "[T]he parties negotiated two payment options, the binding option *dependent on this Court's determination of the Commission's authority.* " This Court has made its determination of the Commission's authority. I see no necessity to "interpret" the contract. Its language is clear and the only question is whether this Court's decision has triggered one or the other of the options. Even assuming that "interpretation" of a court is necessary, I deem it a waste of resources to require intervention of a district court with a resultant appeal to this Court. Neither do I see any "modification" of the contract as an issue. The contract is agreed upon by its parties, and again, the only question appears to be which option has been triggered.

The majority makes reference to the Court's previous decisions in this matter wherein the Commission in ruling upon modification of a contract was directed to utilize a fair, just and reasonable standard *not inconsistent with federal law.* Clearly, the Commission has the authority and expertise to determine if a utility contract is "fair, just and reasonable," but I perceive no authority in the Commission to interpret federal law or determine if federal law has preempted the field, or the extent of that preemption.

111 Idaho 925, 729 P.2d 400

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BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

Docket No. 2004-267-E

In re: PETITION OF COLUMBIA ENERGY LLC FOR A DECLARATORY ORDER CONCERNING AGREEMENT WITH SCE & G FOR WAIVER OF QUALIFYING FACILITY STATUS	)	**CERTIFICATE OF SERVICE**

This is to certify that I, Mary F. Cutler, a Legal Assistant with the law firm of Robinson, McFadden & Moore, P.C., have this day caused to be served upon the person(s) named below the **Columbia Energy LLC's Memorandum in Opposition to SCE & G's Motion to Dismiss** in the foregoing matter by placing a copy of same in the United States Mail, postage prepaid, in an envelope addressed as follows:

Paige J. Gossett, Esquire
Mitchell Willoughby, Esquire
Willoughby & Hoefer, P.A.
1022 Calhoun Street, Suite 302
PO Box 8416
Columbia, SC 29202

Charles H. Williams, II, Esquire
Williams & Williams
370 St. Paul Street N.E.
PO Box 1084
Orangeburg, SC 29116

Len S. Anthony, Esquire
Kendall Bowman, Esquire
Progress Energy Service Company, LLC
Post Office Box 1551
Raleigh, NC 27602

Dated at Columbia, South Carolina this 15th day of November, 2004.

Mary F. Cutler

Mary F. Cutler